Supreme Court, U.S.
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No._____

In the Supreme Court

of the United States

TERM: OCTOBER, 1994

LEROY CLOUSER, et al.,
Petitioners,

v.

MIKE ESPY, SECRETARY OF AGRICULTURE,
UNITED STATES OF AMERICA, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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March 3, 1995.

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QUESTIONS PRESENTED

1. Do mining claim holders, pursuant to the Mining Act of 1872, as amended, possess a Fifth Amendment property right of access to their claims across national forest lands surrounding their claims?

2. May the Forest Service terminate existing motorized access to mining claims situated on national forest lands without affording mining claim holders a procedural due process right to meaingful evidentiary hearings to ensure that the statutory access standards are fairly and accurately applied?

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The parties in the district court case were the appellants in the court of appeals. The named plaintiffs in Clouser, et al. v. Espy, et al were:
Leroy Clouser and Sharon Clouser
(Owners of the Robert E. Mining Claims),
Carl E. Setera, Judith M. Setera, Anthony S. Setera and Lois A. Setera
(Owners of the Thunderbolt Mining Claims),
Gary Hoefler, Don Wurster, Cameron Anderson and Robin Anderson
(Owners of the Wilson Mining Claims).

The defendants in the district court were the appellees in the court of appeals. The named defendants in Clouser, et al v. Espy, et al were:
Mike Espy, Secretary of Agriculture, United States of America
Dale Robertson, Chief Forester, Forest Service, United States Department of Agriculture
John Butrille, Regional Forester, Pacific Northwest Region, Forest Service
Jeff Blackwood, Forest Supervisor, Umatilla National Forest
Craig Smith Dixon, District Ranger, North Fork John Day Ranger District
Mike Lunn, Forest Supervisor, Siskiyou National Forest
Dennis Holthus, District Ranger, Illinois Valley Ranger District
Bruce Babbitt, Secretary of the Interior, United States of America
Cy Jamison, Director of the Bureau of Land Management, United States Department of the Interior
D. Dean Bibles, State Director, Oregon State Office, Bureau of Land Management.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

LEROY CLOUSER, et al., Petitioners

v.

MIKE ESPY, SECRETARY OF AGRICULTURE, UNITED STATES OF AMERICA, et al., Respondents

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners, Leroy Clouser, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on December 7, 1994.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 42 F3d 1522 and is reprinted in Appendix A hereto.

The memorandum decision of the United States District Court for the District of Oregon (Marsh, D.J.) has not been reported. It is reprinted in Appendix B hereto. The Findings and Recommendation of the U.S. Magistrate is reprinted in Appendix C hereto.

JURISDICTION

The petitioners invoked 28 USC 2201 et seq., 5 USC § 701-706, and 28 USC § 1361 in bringing this suit in the District Court for the District of Oregon. On January 28, 1993 the district court issued its Judgment and Order of Dismissal.

On petitioners' appeal, the Ninth Circuit, on December 7, 1994, entered a judgment and an opinion affirming the Oregon District Court order directing the petitioners' action be dismissed.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent provisions of the Fifth Amendment of the United States Constitution, the Administrative Procedure Act, 5 USC 554(d), the Department of Agriculture Organic Administration Act of 1897, 16 USC §§ 1131, 1133(d), 1134(a)(b), relevant portions of the National Wild and Scenic Rivers System Act, 16 USC § 1271, and the National Forest Service Management Act (NFMA), 16 USC § 1600 et seq, the United States Mining Laws, 30 USC §§ 22, 26, 28(f), 612(b), and 621(b), Revised Statutes (RS) 2477, 43 USC § 932, the Federal Land Policy and Management Act of 1976 (FLPMA), 43 USC § 1701, et seq., the Forest Service Mineral Regulations, 36 CFR § 228 et seq., relevant portions of the Forest Service Administrative Appeal Procedures, 36 CFR, Part 251, Subpart C, Interior's "Special Rules Applicable to Public Land Hearings

and Appeals," 43 CFR, Part 4, Subpart E and Subpart B, Interior's Access Regulations, 43 CFR §§ 3802.4-2, 3809.4, Interior's procedures for commencement of placer mining operations, 43 CFR § 3736.2, California Revenue and Taxation Code § 607.5 and Colorado Revised Statutes, Taxation § 39-6-116 and Forest Service Internal Policy Manual, § 2813.14 are set forth in the Appendix herein.

STATEMENT OF THE CASE

At stake here is whether thousands of unpatented mining claim holders on National Forest lands possess sufficient property right of access to their claims pursuant to the Mining Act of 1872, as amended, to entitle these mining claim holders to full evidentiary hearings when the Forest Service affects their claim validity by terminating motorized access to their claims.

The petitioners, holders of certain mining claims located on federal land within National Forests, challenged rulings by the U.S. Forest Service that refused under certain circumstances to permit them from continuing to use motorized vehicles to access their claims for mining operation purposes, requiring them instead to use pack animals.

Petitioners filed suit jointly against the Secretary of Agriculture and various Forest Service and Interior Department officials, seeking declaratory and injunctive relief requiring the respondents to approve petitioners continued motorized access to mining claims and to permit them to conduct mining operations. The case was referred to a magistrate judge who recommended granting the government's summary judgment motion and denying petitioners' summary judgment motion. The district

court, after reviewing petitioners' objections to the magistrate's recommendations, adopted most of the findings of the magistrate and granted respondents' summary judgment motion and denied petitioners' cross motion for summary judgment. Petitioners filed an appeal, and the Ninth Circuit Court of Appeals affirmed the ruling of the district court. (App-A82).

In their lawsuit, three sets of petitioners have asserted rights to mine areas located wholly within federal National Forest lands. Two of the claims (the Robert E. and the Thunderbolt mining claims) are located in regions designated "wilderness areas" pursuant to the Wilderness Act of 1964, 16 USC §§ 1131. (App-D3). The third claim (the Wilson placer mining claim) is located on National Forest lands as part of the National Wild and Scenic Rivers System, 16 USC § 1271.

(App-D7). All three sets of claims at issue are unpatented. (App-A5). For purposes of this case, the government has agreed that Thunderbolt Claim No. 2 is valid. (App-A10). The Robert E. and Wilson mining claims have been declared null and void and petitioners have appealed those decisions to the Interior Board of Land Appeals. (App-A9, 17); the Wilson case is pending in the U.S. District Court of Oregon.

Petitioners challenge certain decisions made by the Forest Service, pursuant to 36 CFR § 228.5 (App-D18), with respect to plans of operation proposed by the petitioners for mining the three sets of claims.

Forest Service Actions on The Five Thunderbolt Placer Mining Claim Plans of Operation

The Forest Service acknowledged that in 1988 the discovery on Thunderbolt No. 2 mining claim had been examined and vali-

dated by the Forest Service and Interior Department. However, in 1990, the Forest Service, without a meaningful hearing, rejected petitioners' documentary information to show prior motorized use of existing roads and existing public roadway (RS 2477) (App-D13) rights to motorized access based on historic trails and roads which existed prior to establishment of the national forest. The Forest Service refused to approve new road construction from the existing road to the mining claims which was gated in 1984. (App-A11, 59, 62).

The Forest Service summary appeal procedure accomplished the following: (1) without mentioning the professional evaluation of petitioner's geologist that motorized access was required for commercial development of the claims (App-E46), determined that rehabilitation of the road for motorized access, with later intensive

on-site mining operations with mechanized equipment, (App-E52-53), was not a sufficient level of mining operations to warrant motorized access; (2) without adequate investigation and testimony concerning historic and current uses in the area, decided that the "customary means" of ingress and egress under the Wilderness Act, 16 USC 1134(b), to the mining claims was by foot or pack animals; (3) without meaningful adjudication, decided that the Forest Service's withholding of approval of the planned mining operations for motorized access and resulting financial losses from delays in road rehabilitation and mining operations stated by petitioner, would not violate the Fifth Amendment due process clause (App-D1) and would not constitute a taking. (App-A10-13, 59-61).

Forest Service Actions on the Six Robert E. Lode Mining Claims Plans of Operation.

In 1990, the Forest Service, without a meaningful hearing and on the basis that in 1988 the Forest Service had initiated Interior Department proceedings contesting the validity of the mining claims, concluded that all six claims were invalid as lacking a discovery of valuable minerals. The Forest Service, without meaningful investigation and adjudication (1) decided that petitioners' planned continued motorized access of 43 years for mining operations over the existing road, and proposed ongoing on-site operations, were no longer "essential" and would result in significant impacts on wilderness values; (2) rejected petitioners' documentary information to show public highway (RS 2477) rights to motorized access based on historic trails and roads existing prior to establishment of the national forest; (3)

decided that Forest Service withholding of approval of continued motorized acess and resulting economic loss asserted by petitioner from inability to maintain underground tunnel works, would not violate Fifth Amendment due process standards and would not constitute a taking. (App-A7-10, 52-54).

Forest Service Actions on The Wilson Placer Mining Claim Notice of Intent.

In 1990, the Forest Service decided that a plan of operations was required to be submitted for Forest Service approval with the District Ranger because of the impact of the planned operations on the Illinois component of the Wild and Scenic Rivers System. In October, 1990, before a final Interior Department administrative decision had been issued deciding the validity of the Wilson claim title, the District Ranger responded to additional information submitted by petitioner

concerning planned mining operations. He stated that he felt that he had no authority to approve significant disturbing mining activity on a mining claim declared null and void. (App-A14-17). This decision effectively terminated petitioners' planned mining operations without a meaningful hearing. The Ninth Circuit held that petitioners, here, had not exhausted their administrative remedies by filing a plan of operation. (App-A36-45).

The Ninth Circuit Court of Appeals upheld the Forest Service actions terminating motorized access to all petitioners' claims. In upholding the Forest Service's termination of motorized access, the Ninth Circuit adopted the Forest Service's interpretation construing that the Mining Act of 1872, 30 USC § 22, as modified by the Surface Resources Management Act of 1955, 30 USC § 612, confers "the right to

possession of a claim only if ... the claim is found to be valid." (App-A22, n.6). The court further held that 30 USC § 612 "does not vest claim holders with a property right to any particular type of access to their claims across national forest wilderness lands surrounding their claims." (App-A77). The court held that 16 USC § 1134(b) defines the access standard and gives the Forest Service authority to restrict access to mining claims in wilderness areas (Robert E. and Thunderbolt claims). The court further held that 16 USC §§ 478, 551 define another access standard and give the Forest Service power to regulate access to mining claims located on lands which are not designated wilderness areas (Wilson claim). (App-A26-35). The Ninth Circuit concluded that the Forest Service has special statutory authority to regulate activities on

National Forest lands, even though "[v]irtually all forms of Forest Service regulation of mining claims ... will result in increased operating costs, and thereby will affect claim validity...." (App-A31).

While finding that Forest Service regulations of mining operations will affect claim validity, and while also acknowledging that full evidentiary hearings are accorded in Bureau of Land Management ("BLM") administrative appeal proceedings under the Interior Department, (App-A79-80), the court refused to recognize petitioners' due process claims. It held that even if petitioners had a constitutionally protected property interest in having the statutory access standard fairly and accurately applied, the Forest Service summary provisions for administrative review of agency decisions conformed with procedural due process requirements. (App-

A79-80).

Petitioners had asserted that the summary provisions for administrative review utilized by the Forest Service had not allowed them a meaningful opportunity at a meaningful time to present evidence and testimony relevant to application of the Forest Service access standards and the need for motorized access in order to assure that these claims would be profitable and continue to support "discovery." (App-A22-23).

REASONS FOR GRANTING THE WRIT

A. THE FOREST SERVICE PLAN OF OPERATIONS PROCESS AND NINTH CIRCUIT HOLDING SEVERELY DISRUPT LONGSTANDING OPERATION OF FEDERAL AND STATE LAWS, CAUSING SUBSTANTIAL CONFLICTS.

A severe departure by the Ninth Circuit in this case from the procedural due process tests formulated by this Court in Mathews v. Eldridge, 424 US 319, 335 (1976) strips holders of unpatented mining

claims of their historic possessory rights to access, use and maintain federal lands for mining purposes, and to protect their mining claim property rights under 30 USC §§ 22, 26, 612(b).

The Ninth Circuit's ruling also undermines the property right basis for the maintenance fee established by Congress in 1993 under 30 USC § 28(f) (App-D10), to be paid annually by all holders of unpatented mining claims. Under 30 USC §§ 22, 26 and 612(b), mining claims for which federal maintenance fees have been currently paid under 30 USC § 28(f) are possessory property rights. These rights include both appurtenant existing and proposed surface uses for ingress and egress over federal lands including national forests, wilderness and other designated use areas.

Similarly, the Ninth Circuit ruling undermines the basis and validity of state

taxation of mining claims. Current state mining taxation statutes recognize that mere "location" of a mining claim confers a taxable real property interest. See, e.g., Colo. Rev. Stat. Title 39, Taxation § 39-6-116 (App-D15) (claims must be "located under the federal mining laws"); Cal. Code., Revenue and Taxation, § 607.5 (App-D14) (the taxable mining interest "shall include the right to enter in or upon the land").

Historic federal and state judicial recognition of unpatented mining claim property rights are similarly abruptly changed. This Court has held that under federal law both holders of federal mining claims and holders of validated mining claims have entitlement to possess land and "may make any use, or no use, of minerals involved." Andrus v. Charlestone Stone Prods. Co., Inc., 436 US 604, 615-16

(1978). The Ninth Circuit construed mining claim possessory rights as being cognizable "only if" the claim has been legally validated. (App-A22, n.6).

A major conflict between circuits also exists because the Ninth Circuit decision holds that the Forest Service may regulate the scope of use of R.S. 2477 highway access to mining claims, notwithstanding whether the state has first determined the existence of such roads. (App-A65-67). The Tenth Circuit held in Sierra Club v. Hodel, 848 F2d 1068, 1080, 1083-85 (10th Cir. 1988), that the Interior Department has primary jurisdiction to determine scope of use of an RS 2477 road located on BLM lands, after the state makes the initial determination that the RS 2477 roadway is perfected.

Most significantly, the Ninth Circuit's ruling denies miners due process

procedural rights to a timely and meaningful hearing to prevent violation of the express congressional mandate in 30 USC § 612(b) (App-A68), prohibiting government surface uses from endangering or materially interfering with mining operations and uses "reasonably incident thereto." See, Silbrico Corp. v. Ortiz, 878 F2d 333, 337 (10th Cir. 1989).

The Ninth Circuit holding, that 30 USC § 612(b) does not limit Forest Service regulation of activities on National Forest lands outside of the boundaries of the mining claim (App-A69-71), seriously erodes the Mining Act of 1872. Plans of operation must be submitted to the Forest Service by miners who undertake operations that will disturb surface resources. These plans of operation relate to use of the surface and subsurface of any mining claim including "all uses reasonably incident thereto,

including roads and other means of access..., regardless of whether said operations take place on or off mining claims." (emphasis added). 36 CFR § 228.3. (App-D17). Accordingly, there is need to resolve whether the "materially interfere" standard of 30 USC § 612(b) applies to actions taken by the Forest Service to terminate mining related activities, such as motorized access, that occur on National Forest lands both inside and outside of the boundary of the mining claims.

The Ninth Circuit's ruling further raises substantial Fifth Amendment fundamental fairness questions by not equating Forest Service with BLM plan of operation processes. Where the BLM proposes to restrict mining operations, a full panoply of due process evidentiary hearing rights are accorded to the miner. See, Interior's "Special Rules Applicable to Public Land

Hearings and Appeals", 43 CFR, Part 4, Subpart B and E (App-D29, 32); Pence v. Andrus, 586 F2d 733 (9th Cir. 1978). Not entitling miners on Forest Service lands to the same forum and due process rights afforded to miners with claims located on BLM lands gives the mining laws discriminatory application.

The administrative review procedures of the Forest Service, conducted pursuant to 36 CFR, Part 251, fail to provide full evidentiary hearings before an independent fact-finding tribunal having jurisdiction over the issues of (1) whether the statutory access standard is fairly and accurately applied and (2) whether the agency may terminate motorized access on existing roads. While acknowledging that the Forest Service regulation could affect claim validity, and hence the property interests of claim holders, (App-A31), the

Ninth Circuit nevertheless concluded that holders of mining claims under Forest Service jurisdiction are not entitled to full oral and evidentiary hearings because they are able "to pursue their claims by filing written pleadings...." (App-A80).

The inadequacy of written pleadings to provide a meaningful adjudication of access issues presents itself in this case. Despite the requirements for development of federal land use management plans affecting unpatented mining claims in national forests under FLPMA and NFMA, considered by this Court in California Coastal Com'n. v. Granite Rock Co., 480 US 572, 585 (1987), there was no evidence in petitioners' cases demonstrating that such plans had been developed or plead in the Forest Service proceedings, or that the Forest Service plan of operation decisions were based on such plans.

Similarly, there is no factual basis plead by the Forest Service to justify termination of motorized access on existing roadways. No environmental or other resource adverse impacts, reaching a magnitude affecting public interests or requiring an emergency shut down (due to the "depredation" access standard of 16 USC § 551) were alleged as a reason for dispensing with due process safeguards required for protecting petitioners' property rights. Cf., Hodel v. Virginia Surface Min. & Reclam. Ass'n, 452 US 264, 299-303 (1981).

B. THIS COURT HAS SUBSTANTIAL BASIS TO SETTLE MINING CLAIM PROPERTY RIGHT QUESTIONS OF NATIONAL IMPORTANCE.

Contrary to long established mining law principles developed by this Court, the Ninth Circuit has approved the Forest Service's interpretation that the mining laws require that "discoveries" on petitioners'

mining claims must be formally validated under the prudent man and profitability tests (only Thunderbolt meets this "test") before those claims may be accorded possessory property right status. (App-A22, n.6, 52, 57-58).

On-Site Mining Claim Property Rights.

This Court has held that a "discovery" is something other than proceedings brought to determine claim validity. "Discovery" has been interpreted to mean the mere staking of a claim:

> "'Discovery' of a mineral deposit, followed by the minimal procedures required to formally 'locate' the deposit, gives an individual the right of exclusive possession of the land for mining purposes, 30 USC § 26...."

United States v. Locke, supra, 471 US 84, 86 (1985).

This Court in Locke, unlike the Ninth Circuit, did not condition the recognition of possessory property rights exclusively upon claim validity. The nature and extent

of possessory mining claim uses granted under the mining laws were further construed by this Court in Andrus v. Charlestone Stone Prods. Co., Inc., supra, 436 US at 615:

> "The holder of an unpatented mining claim, by investing $100 annually in the claim, becomes entitled to possession of the land and may make any use, or no use, of the minerals involved."

"Validation" of mining claims has never been required as a prerequisite for recognizing possessory mining claim rights. California Coastal Com'n. v. Granite Rock Co., supra, 480 US at 575; Best v. Humbolt Placer Mining Co., 371 US 334, 335-336 (1963); Wilbur v. U.S. ex rel Kruschnic, 280 US 305, 316 (1929).

In addition to the principles set forth in these cases, there is no statutory condition in the mining laws, 30 USC §§ 22, 26 and 612(b), for formal validation of mining claims before holders of mining

claims enjoy possessory property rights to use their claims for mining purposes.

Furthermore, although the Forest Service initiated Interior Department proceedings to contest the validity of the Robert E. and the Wilson mining claims, full possessory rights continue to exist during the pendency of validity proceedings:

> "Their right to the claim, unless and until the claim is finally declared void, is a property right. Adams v. Witmer, 9th Cir., 271 F2d 29, 33."

United States v. Barrows, 404 F2d 749, 752 (9th Cir. 1968), cert denied, 394 US 974 (1969). In the present case, however, the Ninth Circuit, in contrast to Interior Department interpretations, upheld the Forest Service's interpretation that these mining claims carry no property right status until validated. (App-A47-52).

The Ninth Circuit had formerly analyzed the property right status of

mining claims where irreparable damage was threatened during the pendency of validity proceedings, in United States v. Barrows, supra, 404 F2d at 752. The Ninth Circuit extended the Barrows holding to the bona fide mining operations in this case, holding that the miners' property rights "may permissibly be restricted pending determination of validity, in order to guard against damage to the claim and surrounding land." (App-A57, n.15). However, no meaningful hearing was afforded to these petitioners, allowing them to show that the Barrows circumstances did not exist.

Consequently, a conflict of national importance between the Ninth Circuit's holdings, the mining statutes and holdings of this Court requires resolution to avoid unnecessary and unfair loss of mining claim property rights.

Off-Site Mining Claim Access Rights

Coinciding with the miners' on-site possessory property interest is the property right of the miner to conduct an economically "feasible" mining operation, free from "material interference" which would effect the validity of the miner's claim because of the government's over-regulation of surface use consistent with environmental standards. 30 USC § 612(b); Silbrico Corp. v. Ortiz, supra, 878 F2d at 337.

Federal laws and regulations recognize that owners of bona fide, unpatented mining claims are entitled to non-exclusive access to their mining operations. 30 USC §§ 22, 26; 16 USC §§ 551, and 1134(b). (App-D8-10; A-27, 47). These statutes, and the BLM and Forest Service regulations implementing these statutes, recognize that owners of bona fide, unpatented mining claims are

entitled to non-exclusive access to their mining operations. 36 CFR § 228.12; 43 CFR § 3802.4-2 (App-D20, 37). The Forest Service manual provides:

> "[t]he right of reasonable access for purposes of prospecting, locating, and mining ... in accordance with the rules and regulations of the Forest Service ... [which] rules and regulations may not be applied so as to prevent lawful mineral activities or to cause undue hardship on bona fide prospectors and miners." (App-C30) (emphasis and bracketed matter added)

Denial of motorized access, as distinct from access in general (such as by pack animal), may deny these bona fide mining claim holders of an important property interest, namely the invalidation of a prior valid claim due to increased operating costs resulting in the mine operator "flunking" the prudent man test. (App-A31).

Heretofore, the courts and the Interior Department have recognized that

competitive costs for preparation and transport (faster delivery) of minerals to market are key "cost factors" in the so-called marketability tests used to validate mining claims. Melluzzo v. Morton, 534 F2d 860, 863-64 (9th Cir. 1976). Relevant evidence used by the Interior Department to test "marketability" of mineral extractions by the operator are (1) ready availability of access to the claims and (2) existence of a market within reasonable proximity to the claims. Charlestone Stone Products Co., Inc. v. Andrus, 553 F2d 1209, 1214 (9th Cir. 1977), rev on other grounds, 436 US 604 (1978). Limitation or termination of motorized access, as opposed to access by pack animal, to a bona fide mining claim may interfere with "cost feasible" delivery of the mineral to the market, making access to the market more costly. Such termination of motorized access may result in a

failure of the operator to meet the marketability and prudent man discovery tests. Hence, the property interests implicated here to non-exclusive access to mining operations become substantial because the regulation of such property interests can effect claim validity, as recognized by the Ninth Circuit. (App-A30-31). An otherwise valid mining claim such as the Thunderbolt claim, is therefore subject to invalidity proceedings simply because the Forest Service is allowed to summarily terminate motorized access without affording the miner a meaningful adjudication.

The Wilderness Act, by reasonable regulations, may confer a right of access consistent with the preservation of the area's wilderness. 16 USC § 1134(b). (App-A47-48). When Forest Service access regulations become unreasonable, they give rise to petitioners' Fifth Amendment due

process claims. The access regulations become unreasonable when they become "so unreasonably circumscribed as to amount to a prohibition" of the right of the bona fide mining operator to ensure that his claim will maintain its status as a "valid" claim meeting the prudent man marketability test. See, United States v. Weiss, 642 F2d 296, 299 (9th Cir. 1981).

Central to the Ninth Circuit's holding diminishing mining claim holders' access rights is the court's erroneous conclusion

> "... that 30 USC § 612 does not vest claim holders with a property right to any particular type of access to their claims across national forest wilderness lands surrounding their claims. The only laws imposing substantive standards in this area are 16 USC § 1314(b) (sic) [cite should be 16 USC § 1134(b)] and the Forest Service regulations implementing that statute. Thus, only if those laws confer a property right to motorized access can plaintiffs possibly state a due process claim."

(App-A77). This holding, of course,

conflicts with the relevant statutes enacted by Congress. Access rights to enter federal lands are conferred by the 1872 Mining Act, 30 USC § 22. This statute confers a right of access in order that "all valuable mineral deposits ... shall be free and open to exploration and purchase...." (emphasis added).

Consistent with the 1872 Mining Act's creation of access for mineral exploration and purchase is the jurisdictional authority Congress has given to Agriculture, 16 USC § 472 (App-B16), to administer public land laws "excepting such laws as affect the surveying, prospecting, locating, appropriating, entering, relinquishing, reconveying, certifying, or patenting of any such lands." (emphasis added).

The relationship of this statutory authority to the Wilderness Act has been interpreted by the United States Attorney

General Benjamin R. Civiletti, Vol. 43 Op. No. 26 (June 23, 1980). (App-E1). The Attorney General distinguishes between pre-existing access rights and proposed "adequate access" over wilderness areas. The Attorney General concludes that "absent a prior existing access right, [the Secretary of Agriculture] may deny 'adequate access' under the Wilderness Act, but [the Secretary] must offer a land exchange as indemnity." (App-D5). Secondly, he concludes that prior existing access rights cannot be extinguished. (App-E25, 26). Hence, the Wilderness Act, 16 USC § 1133(d)(3) (App-D5), was made subject to valid existing rights of access over wilderness areas.

The Attorney General's opinion follows the rulings of this cout which distinguish property interests implicated when application is made for a proposed use or benefit

as opposed to when government restricts continued use of an existing right or benefit. The latter action implicates a substantial, cognizable property right giving rise to more stringent due process requirements. See, Board of Regents of State Colleges v. Roth, 408 US 564, 577 (1972), cited with approval in Pence v. Kleppe, 529 F2d 135, 141 (9th Cir. 1976) ("Pence I").

Here, the Forest Service denied the valid Thunderbolt claim holders continued motorized access over existing roads by gating those roads to traffic since 1984. (App-A64). The same denial of asserted, preexisting and continuing motorized access occurred for the Robert E. and Wilson claimants. (App-A8-10, 46). These denials were accomplished without affording the miners a meaningful evidentiary hearing.

A related component of petitioners' access rights is the existence and scope of use of RS 2477 public highways. Petitioners' pre-existing RS 2477 public highway access claims implicate state laws. Leo Titus, Sr., 92 I.D. 578, 585-588 (1985). Jurisdiction to determine the existence of an RS 2477 public highway rests either with the states or with the Interior Department. Id. In petitioners' cases, the Ninth Circuit, without reaching the prerequisite issue of existence of RS 2477 roads, held that the Forest Service has authority to regulate the scope of their use in any event. (App-A66-67). The Ninth Circuit simply decided that the Forest Service has authority to regulate vested, preexisting rights of the public to motorized use of these highways. This holding conflicts with the Tenth Circuit's holding in Sierra Club v. Hodel, supra, 848

F2d at 1080, 1083-84 (existence of RS 2477 roadways presents a question of state law; scope of use is an administrative agency determination, to the extent usages have not vested). Opportunity exists for this Court to decide, first, whether the issue of existence of RS 2477 roads is a federal or state matter, secondly, which federal agency has primary jurisdiction over such roads, and thirdly, the extent to which existing roadway uses may be regulated.

Review is also sought by this Court to resolve another issue of national importance: the proper and most meaningful method to apply the various access standards to situations where continued use of pre-existing access, versus new construction of access, is involved for different mining claims.

For example, wilderness areas have their own access standards. The Forest

Service may promulgate "reasonable regulations consistent with the preservation of the area as wilderness, [to] permit ingress and egress to such surrounded areas by means which have been or are being customarily enjoyed with respect to other such areas similarly situated." 16 USC § 1134(b); 36 CFR § 228.15(c). (App-D23). For areas not designated "wilderness areas" the access standard is one of permitting ingress and egress consistent with the preservation of the National Forests against destruction by fire and depredations. 16 USC § 551. (App-A27, n.7). For pre-existing access rights, the standards may differ due to the application of the Mining Act of 1872, 30 USC § 22. See, e.g., Att. Gen. Op. (App-E25-26).

Whether the Forest Service regulations find their authority under 16 USC § 1134(b)

for "wilderness areas" or are authorized under the general grant of authority of 16 USC §§ 478 (App-A27, n.8) and 551, for areas not designated "wilderness areas", those Forest Service access standards must be reasonable and must be applied consistently by both the Forest Service and the BLM to mining operations. The standards must also be applied in a manner so as not to "materially interfere" with the property interests of unpatented mining claim holders. The "materially interfere" standard of 30 USC § 612(b), then, provides protection to the mining access rights granted under 30 USC § 22.

C. UNPATENTED MINING CLAIM HOLDERS POSSESS A PROCEDURAL DUE PROCESS RIGHT TO A MEANINGFUL EVIDENTIARY HEARING IN FOREST SERVICE PLAN OF OPERATION PROCEEDINGS AFFECTING MINING CLAIM PROPERTY RIGHTS.

Under the 1872 Mining Act, as amended, 30 USC § 22, 26 and 612(b), the Thunderbolt No. 2 mining claim had been formally

validated, and all of petitioners' other mining claims confer possessory property rights without the claims having been formally validated. Because these mining claims involved existing appurtenant access rights, basis existed for the petitioners to prove and the Forest Service to find that petitioners enjoyed vested motorized access rights to their claims. Therefore, the Ninth Circuit's holding, that petitioners did not state a due process claim necessitating resolution, was erroneous. (App-A77-78).

The Ninth Circuit held that even if the petitioners had affected property interests, procedural due process requirements would have been satisfied by the Forest Service plan of operations procedures. (App-A79-80). However, analysis of the procedural due process rationale utilized in the Ninth Circuit's

holding demonstrates a serious avoidance of the due process principles formulated by this Court for the protection of substantial property interests.

Procedural due process ensures that the property rights of unpatented mining claim holders to access and possession of their mining claims can be protected at a meaningful time and in a meaningful manner. Goldberg v. Kelly, 397 US 254, 267 (1970). This Court, in Mathews v. Eldridge, supra, 424 US at 335, held that specific dictates of procedural due process generally require consideration of (1) the private interests that will be affected by the official (Forest Service) actions; (2) the risk of an erroneous deprivation of such interests through the (Forest Service) procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interests,

including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

The private property interests that have been effected by official Forest Service actions in petitioners' cases are, as previously noted, important and substantial property interests.

The first of the miners' property interests is firmly founded in the statutory right provided by the 1872 Mining Act, 30 USC § 22, to make a profit from mineral discoveries. It is implicit that any regulatory action affecting the capability to make a profit would implicate the opportunity interest underlying this statutory right. In any event, 30 USC § 612(b) removes any doubt about procedural protections by simply prohibiting government from materially interfering with

mining operations. Silbrico Corp. v. Ortiz, supra, 878 F2d at 337.

The profit-making opportunity interest which underlies the mining laws was directly implicated in the validated Thunderbolt mining case. Based on an evaluation of petitioners' geologist, the Forest Service termination of motorized access caused immdiate economic loss by increasing mining costs, delaying development of the discoveries on the claim and reducing profits. (App-E62-63).

A second substantial economic interest of miners underlying their mining claim property rights is in protecting and maintaining their cumulative time and money investments made in prospecting, discovering and developing minerals. Congress has recognized this substantial property interest not only in the 1872 Mining Act, 30 USC §§ 22, 26, but in the Wilderness

Act, as well. 16 USC § 1134(a). The Wilderness Act recognizes that government diminishment of "adequate access" to private property interests situated in wilderness areas constitutes a taking, for which a land exchange must be offered. 16 USC § 1134(a). (App-E11).

The third substantial property interest of miners is in preserving the level of accrued access and mining rights that had vested appurtenant to their mining claims. In all three of these cases, basis exists for establishing through meaningful due process, that motorized mining access rights had vested in existing roads. Based on historic mining and public uses, petitioners in the Thunderbolt and Robert E. mining cases claimed additional rights to use the existing roads by virtue of public highway appropriation under RS 2477 and Oregon law. (App-A61-66).

These property interests are all integrated into 30 USC § 612(b). Congress intended that miners possess the right to conduct an economically "feasible" mining operation, free from "material interference" because of the government's over-regulation of surface use both inside and outside of the boundaries of the mining claim. Because Congress saw the direct nexus such regulation of surface use and restriction in access bears to claim validity and the existence of the property interest itself, Congress enacted the express prohibition against "material interference" with mining operations. 30 USC § 612(b). See, also, H.R. 730, 84th Cong., 1st Sess., reprinted in 1955, U.S. Code Cong. and Admin. News, 274, 2482-2483.

The second Mathews test, the risk of an erroneous deprivation of petitioners' possessory interests through the Forest

Service procedures utilized in this case, is enormous. The Forest Service summary administrative review procedures employed in this case illustrate why these mining claim holders were unable to develop their arguments that termination of motorized access would materially effect claim validity and were inconsistent with applicable access standards.

The Forest Service's abbreviated administrative review procedure failed to afford these miners a meaningful opportunity to obtain, for appellate purposes, a record of the proceedings stating, with sufficient particularity, the justification contained in the record forming the basis for the Forest Service decisions terminating motorized access.

The Ninth Circuit Court's discussion of the administrative review proceedings fails to mention, for example, that the

valid Thunderbolt claim holders introduced a critical geologist report as part of the record. (App-A10-13). The geologist's report recommended motorized access in order to conduct profitable commercial mining. (App-E46-47). The Ninth Circuit held that, contrary to petitioners' claim, the Forest Service's administrative rulings on petitioners' administrative appeals "offered detailed explanations and cited specific statutes and regulations as authority." (App-A79). The court rejected petitioners' claim that the Forest Service's procedures failed to state adequate explanation for its reason. Yet, the agency's "detailed explanations" did not once cite the geologist's report or explain why the geologist's opinion, that motorized access was needed for development of these mines, was rejected. (App-A10-13, 59-61, 79).

The agency's rationale for denying motorized access was that trails proposed for use for motorized access had been gated and closed, and that the scope of the proposed operation was relatively small, needing only a five inch suction dredge. (App-A59-60). The geologist's report recommending motorized access in order to conduct full-scale commercial mining operations consistent with the claim holders' plans of operation, created the requisite factual issue regarding the access standards, necessitating a full adjudicatory hearing.

The Forest Service, as opposed to the BLM and petitioners' mining geologist, neglects to regard the rehabilitation of roads as an intensive mining activity in itself, an activity which forms an integral part of on-site mining operations. See, e.g., Melluzzo v. Morton, supra, 534 F2d at

863-64; Charlestone Stone Products. Co., Inc. v. Andrus, supra, 553 F2d at 1214. In accordance with the geologist's recommendations, the Thunderbolt plan was to engage in full-scale mining operations with mechanized equipment after road rehabilitation had been accomplished in 1989. (See, App-E52). These facts, or the reasons for rejecting this operations rationale, were completely undocumented in the Forest Service review process and by the Ninth Circuit decision. (App-A10-13). The miners simply were not afforded a meaningful opportunity by the Forest Service review process to "tailor their arguments [regarding the geologist's recommendation for motorized access] to the concerns of the [Forest Service] decision maker." Pence v. Andrus, supra, 586 F2d at 739.

The Forest Service's administrative review procedure also failed to afford

these miners a full oral, evidentiary hearing, before an independent fact-finding tribunal giving these miners a meaningful opportunity to present evidence and witnesses and to cross examine witnesses.

For example, the Thunderbolt miners were never given a meaningful opportunity to submit evidence and to call witnesses to prove that the full-scale profitable mining operations contemplated after 1989 required motorized access. The miners were never given an opportunity to submit evidence and testimony, demonstrating that motorized access is "customarily used" with respect to the Thunderbolt type claims to effectuate commercial development. Nor were the miners allowed to present witnesses to more fully develop the factual determination of vested access routes and RS 2477 uses. Such adjudications involve issues which lend themselves both to the evaluation of

expert or technical data and the credibility of lay testimony. For example, the issue of "customary use" of roadways and access routes involves reconstruction of past events, the reliability of which rests upon witness credibility and veracity. In such a case as this, meaningful due process requires more than written submissions or pleadings. Goldberg v. Kelly, supra, 397 US at 269. The miner must be allowed to tailor his argument "in a manner that stresses points that appear to be important to the decision-maker" and to present witnesses whose credibility can be tested. Pence v. Kleppe, supra, 529 F2d at 142-143.

An adjudication of whether or not termination of particular motorized access will materially interfere with the mining operation by making the bona fide operation economically unfeasible involves taking testimony from many of the same witnesses

who would be called to testify on the issue of "marketability" or the "prudent man" test in a formal Interior Department validity contest proceeding. A no lesser hearing requirement should be afforded to claim holders when the economic feasibility of their mining operations is threatened through termination of motorized access than is afforded to those claim holders when the government contests the validity of their mining claims.

By the same token, no meaningful evidentiary hearing was afforded to the Robert E. and Wilson miners allowing them to develop a record indicating that there were no "depredations" involved (relevant standard for the Wilson claim). 16 USC § 551. Furthermore, no testimony could be taken from witnesses who might have been called to establish the existence of public highways under RS 2477. Assuming that these RS

2477 highways are, nonetheless, subject to Forest Service regulation, (App-A66-67), no meaningful evidentiary hearing was provided to the miners allowing them to submit evidence and testimony establishing whether or not the applicable access standard allowed motorized access to the Robert E. claims.

Another substantial risk of erroneous deprivation exists because the procedures utilized by the Forest Service involve submission of documentary evidence in conjunction with plans of operation to Forest Service fact gatherers who also act as decision makers. (App-A8-17). This Forest Service procedure is inconsistent with the standards of the Administrative Procedure Act. 5 USC § 554(d). (App-D1).

Here, not only are the fact gatherers the decision makers, but "the initial view of the facts [by the District Ranger] based

on the evidence derived from nonadversarial processes as a practical or legal matter foreclosed fair and effective consideration ... leading to ultimate decision." Such a procedure raises a substantial due process question because "the risk of unfairness is intolerably high." Withrow v. Larkin, 421 US 35, 58 (1975). The risk of unfairness is intolerably high because the Forest Service review procedure provides for no "subsequent adversary hearing leading to ultimate decision." Id. "Where, an initial determination is made by a party acting in an enforcement capacity, due process may be satisfied by providing for a neutral adjudicator to 'conduct a de novo review of all factual and legal issues.'" Concrete Pipe & Prod. v. Const. Laborers Pen. Tr., ____ US ___, 113 S.Ct 2264, 2277 (1993). Here, the District Ranger performs a judicial (or quasi-judicial) function

(although he hears no witnesses) in addition to his investigatory and enforcement authority. 36 CFR 228.4, 228.7 (App-D17, 20). But if the miner excepts to the District Ranger's decision, the miner is not entitled to a de novo hearing before an Administrative Law Judge ("ALJ"). Cf., Marshall v. Jerrico, Inc., 446 US 238, 245, 247-48 (1980).

The Forest Service procedure provides for an "oral presentation" by the parties to the reviewing officer "to restate, emphasize, and/or clarify information related to an appeal." 36 CFR § 251.97 (App-D28). Compare with Interior Department's regulation allowing the operator to file an appeal first to the State Director, then to the Interior Board of Land Appeals, 43 CFR § 3809.4 (App-D38), where the operator may request a full oral and evidentiary hearing before an ALJ. 43 CFR

§ 4.415. (App-D32). No provision is made in the Forest Service procedures for subpoenaing witnesses or documents. Compare with Interior's regulations at 43 CFR §§ 4.26, 4.423 (App-D30, 33). No Forest Service provision is made for the formal taking of testimony and preservation of testimony by transcript before an ALJ. Compare with Interior's regulations, 43 CFR §§ 4.23. 4.433, 4.434, 4,435, 4.437 (App-D29, 33-35). No provision is made that a record of the Forest Service's "oral presentation" be made a part of the appeal record. Compare 36 CFR § 251.98(b) (App-D29) with Interior's regulations at 43 CFR §§ 4.24, 4.439. (App-D30, 35). The Forest Service reviewing officer decides issues of law and fact and establishes appeal procedures which are not subject to further review. 36 CFR § 251.95. (App-D27). The oral presentation is tantamount to an

informal meeting with Forest Service officials; no due process safeguards are present to assure the accuracy and thoroughness of fact finding and preservation of the rationale for rulings.

Another major flaw with the Forest Service process is the absence of "a neutral and detached judge in the first instance." Ward v. Village of Monroeville, Ohio, 409 US 57, 61-62 (1972.) "Even appeal and a trial de novo will not cure a failure to provide a neutral and detached adjudicator." Concrete Pipe & Prod. v. Const. Laborers Pen. Tr., supra, 113 S.Ct at 2277. Again, "the risk of unfairness is intolerably high," Withrow v. Larkin, supra, 421 US at 58, because of the Forest Service's bias to protect surface use and the environment.

The crux of the problem with the Forest Service's administrative review

procedures is that this agency, unlike the BLM, has no administrative expertise or an established hearings and appellate procedure to fully and fairly adjudicate the issues of mining access rights which impact mining operations and claim validity. The Forest Service's review procedures contemplate only review of non-adjudicatory Forest Service actions such as decisions involving regulation of non-mining land uses (not adversely affecting mining operations) for which permits are required (i.e., road use or timber cutting permits). 36 CFR § 251.82. (App-D24). The review procedures do not contemplate actions affecting access rights to mineral claims, such as, for example, easements issued for oil and gas pipeline purposes. 36 CFR §§ 251.82(8), 251.53(e). (App-D26, 23).

A Forest Service employee acting as a fact gatherer and decision maker under such

circumstances can hardly be expected to be "neutral and detached." Compounding this risk of bias, no provisions exist for the disqualification of Forest Service fact finders. Compare with Interior's regulation at 43 CFR § 4.27(c). (App-D31).

The risk of erroneous deprivation of petitioners' property rights is further illustrated because of the narrow "arbitrary and capricious" scope of review standard applied to Forest Service fact-finding under its procedures. (App-A63). Quite clearly, federal court review under the narrower standard left unanswered some very important questions. For example, did the agency, in applying the access standard to the Thunderbolt claims, act arbitrarily and capriciously in considering or failing to consider the relevant geologist's report recommending motorized access?

Another risk of error is that the Forest Service might not have made available all of the relevant record information to the decision maker, such as where historic records are not researched and retrieved from the archives. Such safeguards are not now made available by Forest Service procedures, because, as discussed, the ability to issue subpoenas and to cross-examine witnesses pertaining to such historic records is absent. The absence of such due process safeguards means an enormous risk of erroneous deprivation where, for instance, the issue of existence of RS 2477 public roads is being adjudicated.

In summary, then, the lack of procedural safeguards in the Forest Service's deferential appeal process, together with this agency's briefer summary review procedures, mean a very high risk of erroneous

deprivation to the miners in these cases, especially to the Thunderbolt claim holders.

In addition, Forest Service regulations contain no additional or substitute pre- or post-deprivation procedural safeguards which can be made available to these petitioners to prevent the loss of possessory rights described above. See, 36 CFR § 228.14. (App-D21) (authorizing an appeal only via the provisions of 36 CFR Part 251, Subpart C).

Finally, there is the third Mathews test -- a consideration of the government's interests, as well as fiscal and administrative burdens, that such a predeprivation evidentiary hearing would entail. This test supports the use of the same hearing procedure as is now utilized by the BLM, which applies the same access standards to mining claims. See. Interior's "Special

Rules Applicable to Public Land Hearings and Appeals" 43 CFR, Part 4, Subpart E. (App-D32). Clearly, the government has interest in insuring that its access standards are fairly and accurately applied. The government also has an interest in insuring that no differences in application of the access standards exist between the two agencies charged with overseeing mining operations and claim validity, namely the BLM and the Forest Service. No fiscal or administrative burdens block utilization of full evidentiary hearings by the Forest Service where motorized access is sought to be terminated by the Forest Service to mining claims located on National Forest lands.

In fact, the least costly and most efficient process might favor utilization of existing Interior Department hearings and appeals processes. Full evidentiary

hearings, as part of a predeprivation Forest Service procedure would, in fact, ensure governmental cooperation between the Interior Department and the Forest Service, as illustrated by Mr. Lamoure in his Affidavit (See, App-E28).

This Court has examined "history and contemporary practice" to ascertain what process is due where property rights are threatened by governmental action. See, e.g., Connecticut v. Doehr, 501 US 1, 111 S.Ct 2105, 2119 (1991). Contemporary practice supports utilization of Interior's "Special Rules Applicable to Public Land Hearings and Appeals," where BLM (as opposed to Forest Service) plans of operation implicate mining claim property rights. Congressional history, likewise, supports utilization of full evidentiary hearings, even where mining claim property rights have not fully ripened. For

example, Congress, in the Mining Claims Rights Restoration Act of 1955, 30 USC § 621(b) (App-D11), required that the Interior Department provide full evidentiary hearing procedures for placer mining surface use determinations. Congress conferred such full hearing rights even though placer mining possessory rights do not formally arise under that Act unless a hearing is waived by the government or until after favorable surface use determinations have been made. 30 USC 621(b), 43 CFR § 3736.2 (App-D36). A no lesser standard of due process should be accorded to these petitioners, whose mining possessory rights have already ripened.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Philip F. Schuster, II
Counsel of Record
Roger F. Dierking
Counsel for Petitioners

Dated: March 3, 1995.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LEROY CLOUSER and SHARON CLOUSER (Owners of the Robert E. Mining Claims, CARL E. SETERA, JUDITH M. SETERA, ANTHONY S. SETERA and LOIS A. SETERA (Owners of the Thunderbolt Mining Claims), GARY HOEFLER, DON WURSTER CAMERON ANDERSON and ROBIN ANDERSON (Owners of the Wilson Mining Claim),	No. 93-35051 D.C. No. CV 91-3-DA OPINION
Plaintiffs-Appellants,	
v.	
MIKE ESPY, Secretary of Agriculture, United States of America, DALE ROBERTSON, Chief Forester Forest Service, JOHN BUTRUILLE, Regional Forester, Pacific Northwest Region, JEFF BLACKWOOD, Forest Supervisor, Umatilla National Forest, CRAIG SMITH DIXON, District Ranger, North Fork John Day Ranger District, MIKE LUNN, Forest Supervisor, Siskiyou National Forest, DENNIS HOLTHUS, District Ranger, Illinois Valley Ranger District, BRUCE BABBITT, Secretary of the Interior, CY JAMISON,	

Director of the Bureau of)
Land Management, D. DEAN)
BIBLES, State Director,)
Oregon State Office,)
)
Defendants-Appellees.)

Appeal from the United States
District Court for the District of Oregon
Malcolm F. Marsh, District Judge, Presiding

Argued and Submitted
July 13, 1994 -- Portland, Oregon

Filed December 7, 1994

Before: Thomas Tang and Charles Wiggins,
Circuit Judges, and Thelton E. Henderson,
District Judge

Opinion by Judge Henderson

OPINION

HENDERSON, District Judge:

This case is a lawsuit by holders of certain mining claims located on federal land within National Forests. The claim holders challenge rulings by the U.S. Forest Service that, among other things, refused under certain circumstances to permit them to use motor vehicles to access their claims, requiring them instead to use pack animals. On the parties' cross motions for summary judgment, the district court granted summary judgment for defendants and plaintiffs appealed. For the reasons set forth below, we affirm.

I. BACKGROUND

A. OVERVIEW

This lawsuit is brought by three different sets of plaintiffs, all of whom have asserted rights to mining in areas located wholly within federal national

forest lands. Two of the claims are located in regions designated "wilderness areas" pursuant to the Wilderness Act of 1964, 16 U.S.C. §§ 1131-1136, and the third is located on national forest land that is part of the National Wild and Scenic Rivers System, 16 U.S.C. § 1271. In each case, the national forest land in which the mining claims are located was at one time open to the public for exploration, prospecting, and the extraction of minerals;[1] however,

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[1]The Mining Claims Act of 1872, 30 U.S.C. § provides, in pertinent part, that

> Except as otherwise provided, all valuable mineral deposits in lands belonging o the United States . . . shall be free and open to exploration and purchase ....

Construing this provision, the Supreme Court has held, however, that

> This section is not as comprehensive as its words separately considered suggest . . . . [I]t is apparent that, while embracing only lands owned by the United States, it does not

the land was subsequently withdrawn from mineral entry under the Wilderness Act or the Wild and Scenic Rivers Act, so that only persons establishing that they discovered a valuable mineral deposit prior to the withdrawal possess a valid right to mine claims there (a "valid claim"). All three sets of claims at issue are unpatented.[2]

> embrace all that are so owned. . . . Only where the United States has indicated that the lands are held for disposal under the land laws does the section apply; and it never applies where the United States directs that the disposal be only under other laws.

Oklahoma v. Texas, 258 U.S. 574, 599-600 (1922). See Brown v. U.S. Dep't of the Interior, 679 F.2d 747, 750-51 (9th Cir. 1982).

[2]An "unpatented" claim is a possessory interest in a particular area solely for the purpose of mining; it may be contested by the government or a private party. By contrast, if a claim is patented, the claimant gets a fee simple interest from the United States and no contest can be brought against the claim. See Northern Alaska Envtl. Ctr. v. Lujan, 872 F.2d 901,

The validity of such claims is determined by the U.S. Department of the Interior ("Interior") through its Bureau of Land Management ("BLM"), which administers the federal laws governing the right to stake mining claims on federal land. However, the claims are located on national forest lands which otherwise are regulated by the U.S. Forest Service ("Forest Service" or "Service"), a part of the U.S. Department of Agriculture ("Agriculture"). This case involves a challenge to certain decisions made by the Forest Service with respect to plans proposed by the plaintiffs for mining the three sets of claims at issue.

The Challenged Forest Service decisions are: (1) Forest Service rulings refusing to permit motorized access to, or to approve the conduct of other mining

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904 n.2 (9th Cir. 1989).

activities on, certain claims, pending determination of claim validity by the Department of the Interior (the "Wilson" and "Robert E." claims); (2) Forest Service rulings that, even for valid claims, access to claims located within federal national forest lands should be limited to non-motorized means where the Forest Service considers such means adequate to carry out the proposed mining operations (the "Robert E." and "Thunderbolt" claims); and (3) a Forest Service ruling requesting that plaintiffs file a plan of proposed mining operations, as required by Forest Service regulations (the "Wilson" claim).

B. DESCRIPTION OF THE THREE GROUPS OF MINING CLAIMS AT ISSUE AND THE ADMINISTRATIVE PROCEEDINGS PRECEDING THIS LITIGATION

1. THE ROBERT E. MINING CLAIMS

The Robert E. claims, owned by plaintiffs Leroy and Sharon Clouser, are part of the Siskiyou National Forest and are lo-

cated in Curry County, Oregon. The claims are located on land that was included in the Siskiyou Forest Reserve on October 5, 1906, and withdrawn from mineral entry when it became part of the Kalmiopsis Wilderness on September 3, 1974. ER at 150.[3]

In 1985, the Forest Service conducted a mineral examination of the Robert E. claims and initiated contest proceedings in the Department of the Interior to have the claims declared void, on the ground that no valuable mineral deposits had been discovered there before 1964 when the land was

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[3]The following abbreviations are used through this opinion:

BB = Blue Brie (plaintiffs' initial brief)

RB = Red Brief (the government's opposition brief)

GB = Gray Brief (plaintiffs' reply brief)

ER = Excerpts of Record

SER = Supplemental Experts of Record

withdrawn from mineral entry.[4] An Interior Department Administrative Law Judge ("ALJ") held the claims null and void, and plaintiffs have appealed that decision to the Interior Department's Board of Land Appeals. ER at 220 n.4.

In June 1990, plaintiffs filed a plan of operations with the Forest Service, proposing certain mining activities on the Robert E. claims. The plan proposed accessing the claims by using motor vehicles to drive to the claims across surrounding national forest wilderness lands. The Forest Supervisor approved the plan subject to certain conditions, one of which was that plaintiffs would have to use non-motorized means such as pack animals to access the claims. SER at 55-57.

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[4]Mining claims located on withdrawn lands are invalid. See United states v. Consolidated Mines & Smelting Co., 455 F.2d 432, 444 (9th Cir. 1971).

Plaintiffs appealed this decision to the Duty Regional Forester who affirmed it in October 1990.

2. THE THUNDERBOLT MINING CLAIMS

The Thunderbolt claims, owned by plaintiffs Carl, Judith and Anthony Setera, are located in the Umatilla National Forest in Oregon. The lands on which the claims are located were included in the Blue Mountain Forest Reserve on March 15, 1906; these lands were withdrawn from mineral entry and became part of the North Fork John Day Wilderness Area on June 26, 1984. There are six claims; five were located in 1980 and the sixth in 1982. For purposes of this case only, the government has agreed to assume that Thunderbolt claim #2, the only claim involved in this case is valid. SER at 26.

In August 1988, the plaintiffs filed a notice of intent and plan of operations

proposing the use of a "suction dredge" and other equipment to test Thunderbolt claim #2. They proposed motorized access over two Forest Service trails covering distance of approximately four miles in the wilderness. This proposed route had been gated and blocked from traffic in 1984 after the land was included in the North Fork John Day Wilderness Area. SER at 49. In November 1988, the Forest Supervisor issued a decision restricting plaintiff to using pack animals or other non-motorized means of access, on the ground that motorized access was not essential due to the limited nature of the proposed operation. ER at 62-63; ER at 152.

In May 1989, plaintiffs proposed another plan of operations, which they revised in July 1989. The revised plan proposed use of a five-inch suction dredge and motorized access over the same two

Forest Service roads. ER at 69-71. In August 1989, the Forest Supervisor determined, based on an environmental assessment that had been conducted in 1988, that the plan could not be approved a submitted because motorized access was not necessary given the low level of proposed operations and because of the Forest Service's statutory mandate to preserve the wilderness characteristics of the lands in question. ER at 73-74. The Forest Supervisor directed the plaintiffs to amend the operating plan and to provide for access by horses or other non-motorized means. ER at 73-74.

Plaintiffs appealed, and in February 1990 the Deputy Regional Forester affirmed the Forest Supervisor's decision limiting access to non-motorized means. The plaintiffs filed a petition for discretionary review of this decision with the Chief of

the Forest Service, but it was denied. ER at 102.

3. THE WILSON PLACER MINING CLAIM

The Wilson Claim, owned by plaintiffs Gary Hoefler, Don Wurster, and Cameron and Robin Anderson, is located along the Illinois River in Josephine County, Oregon. It is part of the Siskiyou National Forest and the Illinois River component of the Wild and Scenic Rivers System. ER at 148. The lands on which it is located were withdrawn from mineral entry on January 7, 1926, pursuant to § 24 of the Federal Power Act of 1920, codified as amended at 16 U.S.C. § 818. The land was reopened to mineral entry in 1955, but withdrawn again pursuant to the Wild and Scenic Rivers Act of 1968, 16 U.S.C. § 1271 et seq. The Forest Service's records indicate that the claim was located on July 14, 1934, at a time when the lands were not open to

mineral entry. SER at 2-7, 10, 12.

In September 1988, plaintiffs submitted a plan of operations to the District Ranger of the Siskiyou National Forest proposing mining activities on the claim. ER at 38. The District Ranger acknowledged receiving the plan but explained that he could not approve it until the claim's validity could be established. ER at 39. The District Ranger again refused to approve the plan because of doubts about the claim's validity. He explained that he had asked the BLM to determine the status of the lands encompassed by the Wilson claim and would await the BLM determination on the validity of the claim before making a final decision on the proposed plan of operations. ER at 40-41.

In March 1990, plaintiffs submitted a notice of intent to file a plan of

operations. In April 1990, the District Ranger wrote back, explaining that the Forest Service could not approve mining operations on the claim until it received a BLM opinion on the legal land status o the claim "demonstrat[ing] that a valuable mineral deposit existed as of the date of the withdrawal." ER at 42-43. Plaintiffs filed a notice of appeal. ER at 44.

In the meantime, on June 6, 1990, the BLM issued a decision declaring the Wilson claim null and void on the ground that the claim was located at a time when the land in question had been withdrawn from mineral entry. The plaintiffs appealed the BLM decision to the Interior Board of Land Appeals. SER at 12, 14. Following the BLM decision, the Acting Forest Supervisor dismissed plaintiffs' Forest Service appeal as moot. ER at 47.

Plaintiffs then requested that the

Regional Forester stay the decision mooting their appeal of the District Ranger's decision of April 1990. ER at 48, 50. The Deputy Regional Forester wrote back that the District Ranger's decision not to approve the notice of intent until the BLM decision had been issued was not an appealable decision; he explained that the purpose of a notice of intent is to assist the District Ranger in determining whether a plan of operations is required, and that only a decision on the actual plan of operations, when issued, would be appealable under 36 C.F.R. Part 251. ER at 54.

Plaintiffs filed another notice of intent in October 1990. The District Ranger determined that because the proposed operations would "likely cause significant disturbance of surface resources," the Forest Service regulations required that plaintiffs file a plan of operations. The

District Ranger also noted that the BLM had declared the Wilson claim null and void, but recognized that "you have appeal rights [within Interior] to this decision and have a valuable interest to protect by maintaining assessment work during the appeal process." ER at 56. Plaintiffs have not submitted a plan of operations pursuant to the District Ranger's decision.

In September 1993, well after this suit was filed and while this appeal was pending, the Interior Department Board of Land Appeals affirmed the BLM's decision ruling the Wilson claim null and void.

C. THIS LAWSUIT

Plaintiffs filed suit jointly against the Secretary of Agriculture and various Forest Service and Interior officials, seeking only declaratory and injunctive relief requiring the defendants to grant plaintiffs motorized access to their mining

claims and permit them to conduct mining operations. ER at 1-21. The district court referred the case to a magistrate judge. On the parties' cross-motions for summary judgment, the magistrate judge recommended granting the government's summary judgment motion and denying plaintiffs' summary judgment motion. ER at 146. The district court, after reviewing plaintiffs' objections to the magistrate's report, adopted most of the findings of the magistrate and proceeded to grant defendants' summary judgment motion and deny plaintiffs'. This appeal followed.

II. STANDARD OF REVIEW

The district court's grant of summary judgment for the government is reviewed de novo by the court of appeals. United States v. City of Spokane, 918 F.2d 84, 86 (9th Cir. 1990), cert. denied, 501 U.S. 1250 (1991).

III. THE FOREST SERVICE'S AUTHORITY TO REGULATE INGRESS TO AND EGRESS FROM MINING CLAIMS LOCATED IN NATIONAL FOREST LANDS.

In their complaint, plaintiffs challenged the Forest Service's ruling on, inter alia, the ground that the Service lacked statutory authority to regulate ingress to and egress from mining claims located in national forest lands.[5] In the

[5]In this case, plaintiffs challenge the Forest Service's actions on numerous rounds. Among these are two claims - challenges to arbitrary and capricious agency action and to wrongly withheld agency action - that plaintiffs describe as being asserted under the Administrative Procedure Act, 5 U.S.C. §§ 701-706. See BB at 31-34. However, it is equally the case that plaintiffs' other arguments against the challenged actions - that they were taken without statutory authority, or that they violate statute standards - should also be regarded and treated as claims under the APA. This is because the APA is a framework statute that provides the generally applicable means for obtaining judicial review of actions taken by federal agencies. Generally, except where a party challenges an agency action as violating a federal law - be it a statute, regulation, or constitutional provision - that has been interpreted as conferring a private right of action, or where a particular regulatory

scheme contains a specialized provision for obtaining judicial review of agency action under the scheme, review under a framework statute such as the APA is the sole means for testing the legality of federal agency action. See Lujan v. National Wildlife Federation, 497 U.S. 871 (1990); Sierra Club v. Penfold, 857 F.2d 1307, 1315 (9th Cir. 1988).

Of the laws that plaintiffs charge the challenged Forest Service decisions violate, only the constitutional provisions confer private rights of action such that parties may sue directly under them and need not proceed under the APA for those claims. See Broughton Lumber Co. v. Yeutter, 939 F.2d 1547, 1556 (Fed. Cir. 1991) (takings clause of U.S. Constitution is self-executing). All of plaintiffs' other claims must be brought under the APA.

The APA instructs:

> The reviewing court shall --
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be --
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional rights,1 power, privilege, or immunity;

course of granting judgment for defendants and denying summary judgment for plaintiffs, the district court ruled that, as a matter of law, the Department of Agriculture, through the Forest Service, has authority to regulate the means of transportation that plaintiffs may use to cross the national forest areas that surround their claims in order to gain access to the claims. ER at 218. Plaintiffs now challenge that ruling on appeal.

> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law . . . .

5 U.S.C. § 706. thus, the instant claim challenging the Forest Service rulings as issued without statutory authority should be construed as a claim challenging agency action "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right" under 5 U.S.C. § 706(2)(C).

A. PLAINTIFFS' ARGUMENT

Plaintiffs assert - no doubt correctly - that the means of access permitted materially affects the commercial viability of mining claims. Under the legal standard applied by the Department of the Interior to determine whether a putative claim is "valid," validity depends in part on commercial viability.[6] On this basis,

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[6]"A mining claimant has the right to possession of a claim only if he has made a mineral discovery on the claim." Lara v. Secretary of Interior, 820 F.2d 1535, 1537 (9th Cir. 1987). A "discovery" is defined as having occurred in circumstances

> Where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine . . . .

Chrisman v. Miller, 197 U.S. 313, 322 (1905), quoted in Lara, 820 F.2d at 1541. The Supreme Court subsequently refined this prudent person test, holding that "profitability is an important consideration in applying the prudent-[person] test." United

plaintiffs argue that adjudication of questions concerning access materially affects claim validity. They therefore contend that adjudication of such issues is committed to the exclusive jurisdiction of the Department of the Interior since, the parties agree, Interior is the agency authorized to adjudicate the validity of mining claims.

Although all three of the claims at issue in this suit are located within national forests, only two of them - the Robert E. and Thunderbolt claims - are located within areas that have been designated "wilderness areas" pursuant to the Wilderness Act. Because the Forest Service has special statutory authority to regulate activities in wilderness areas, we

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States v. Coleman, 390 U.S. 599, 602 (1968), quoted in Lara, 820 F.2d at 1541. Thus, the profitability of a putative claim can affect whether the claim is found to be valid.

shall address separately the question of Forest Service regulation of access to claims located in wilderness areas and non-wilderness areas.

B. CLAIMS ON NATIONAL FOREST LANDS THAT ARE DESIGNATED AS "WILDERNESS AREAS": THE ROBERT E. AND THUNDERBOLT CLAIMS

[1] As to these two claims located in wilderness areas, there can be no doubt whatsoever that the Forest Service enjoys the authority to regulate means of access, for the department of Agriculture has expressly been granted statutory authority to do so. 16 U.S.C. § 1134(b) provides that

> In any case where valid mining claims or other valid occupancies are wholly within a designated national forest wilderness area, the Secretary of Agriculture shall, by reasonable regulations consistent with the preservation of the area as wilderness, permit ingress and egress to such surrounded areas by means which have been or are being customarily enjoyed with respect to other such areas similarly situated.

This provision's unambiguous instruction to the Secretary of Agriculture to permit ingress and egress to such areas "by means which have been or are being customarily enjoyed with respect to other such areas similarly situated" clearly implies an authority and duty to determine what means are being or have been "customarily enjoyed" in like areas. Indeed, the provision expressly empowers the Secretary to promulgate "reasonable regulations" implementing the statutory mandate. Although Forest Service decisions regarding access may indeed affect whether a claim is found to be "valid," that fact in no way alters 16 U.S.C. § 1134(b)'s unequivocal delegation of authority to the Secretary of Agriculture. While Congress has assigned to Interior authority to adjudicate claim validity, it is free to allocate regulatory authority as it chooses and in 16 U.S.C. §

1134(b) it has empowered Agriculture to make decisions regarding a particular issue that happens to have collateral consequences for claim validity.

C. CLAIMS ON NATIONAL FOREST LANDS THAT ARE NOT DESIGNATED "WILDERNESS AREAS": THE WILSON CLAIM

National forest lands that are not designated as wilderness areas are not covered by 16 U.S.C. § 1134(b). However, the government maintains that other grants of statutory authority empower the Department of Agriculture to regulate the means that may be used to access mining claims that are located in nonwilderness area national forest lands. The government relies on two provisions of the Organic Administration Act of 1897, which established the national forest system. That statute authorizes the Secretary of Agriculture to promulgate rules and regulations to protect the national forest

lands from destruction and depredation. 16 U.S.C. § 551.[7] Further, it specifies that persons entering the national forests for the purpose of exploiting mineral resources "must comply with the rules and regulations covering such national forests." 16 U.S.C. § 478.[8]

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[7]The Secretary of Agriculture shall make provisions for the protection against destruction by fire and depredations upon the public forests and national forests which may have been set aside or which may be hereafter set aside ... and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction....

16 U.S.C. § 551

[8]Nothing in section[] ... 551 of this title shall be construed as prohibiting ... any person from entering upon such national forests for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof. Such persons must comply with the rules and regulations covering such national forests.

Interpreting the scope of the Forest Service's rant of regulatory authority, this circuit has held that

> The Forest Service may properly regulate the surface use of forest lands. While the regulation of mining per se is not within Forest Service jurisdiction, where mining activity disturbs national forest lands, Forest Service regulation is proper. See United States v. Weiss, 642 F.2d 296, 298 (9th Cir. 1981) (Secretary of Agriculture has "power to adopt reasonable rules and regulations regarding mining operations within the national forest"); United States v. Richardson, 599 F.2d 290 (9th Cir. 1979) cert. denied, 444 U.S. 1014 (1980) (recognizing the conflict between mining and forest land policies and holding that the district court may properly enjoin unreasonable destruction of surface resources).

United States v. Goldfield Deep Mines Co., 644 F.2d F.2d 1307, 1309 (9th Cir. 1981), cert denied, 455 U.S. 907 (1982). In Goldfield and several other cases, this court ha upheld Forest Service authority to regulate mining operations in national

forests by requiring miners to submit for approval operating forests by requiring miners to submit for approval operating plans for their proposed operations. See, United States v. Weiss, 642 F.2d 296, 298 (9th Cir. 1981); United States v. Doremus, 888 F.2d 630, 632 (9th Cir. 1989), cert. denied, 498 U.S. 1046 (1991). Cf. United States v. Richardson, 599 F.2d 290 (9th Cir. 1979), cert denied, 444 U.S. 1014 (1980). In reaffirming the Forest Service's authority to regulate mining, the Doremus court rejected a miner's contention that conduct "reasonably incident[al]" to mining could not be so regulated. Doremus, 888 F.2d at 632.

[2] In light of the broad language of § 551's grant of authority, § 478's clarification that activities of miners on national forest lands are subject to regulation under the statute, and this substan-

tial body of case law, there can be no doubt that the Department of Agriculture possesses statutory authority to regulate activities related to mining -- even in non-wilderness areas -- in order to preserve the national forests. 16 U.S.C. § 551.

As noted above, plaintiffs argue that because the permissibility of motor-vehicle access may affect whether a claim is deemed to be "valid," the issue of access is different from other matters that the Forest Service may permissibly regulate. Plaintiffs contend that means of access go to the validity of the claim and, as such, are committed to the jurisdiction of Interior. Rejecting this argument, the district court wrote:

> I find that it is the nature of the issue presented (i.e. mode of access), not the <u>effect</u> of the determination which determines the appropriate agency forum. Thus, the fact that the Forest

> Service's rejection of a particular method of access may have a "material impact" on the mining claim activity does not transform the determination from one within the province of the Forest Service to one within the exclusive province of the Interior Department.

ER at 218 (emphasis in original). We concur in this conclusion. Virtually all forms of Forest Service regulations of mining claims -- for instance, limiting the permissible methods of mining and prospecting in order to reduce incidental environmental damage -- will result in increased operating costs, and thereby will affect claim validity, for the reasons explained above. See supra note 7. However, the above case law makes clear that such matters may be regulated by the Forest Service, and plaintiffs have offered no compelling reason for distinguishing means of access issues from other such forms of

regulation.[9]

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[9]This conclusion is supported by the only case addressing a similar issue cited by the parties. That case, United States v. Fuller, No. CIV-S-83-850-LKK. (E.D. Cal. Aug. 28, 1987) (Karlton, J.), ER at 175, concerned a cabin that holders of a mining claim located within a national forest wilderness area had built in connection with their claim. Acting pursuant to its regulations issued under 16 U.S.C. § 551, the Forest Service had ordered the claim holders to remove the cabin. The claim holders argued that the Forest Service's regulations and the challenged action impinged on the Interior Department's zone of regulatory authority regarding mining claims, and therefore were invalid.

The Fuller court rejected this contention, finding that the challenged regulations

> are wholly consistent with the statutory authority of the Secretary of Agriculture, and so long as their application does not result in a declaration of the validity or invalidity of a mining claim, they do not usurp upon the powers delegated to the Secretary of the Interior.

Fuller, slip op. at 23-24. Fuller is thus authority for the proposition that, where there exists statutory authority for them to do so, agencies other than Interior may regulate matters related to mining activities so long as they do not purport to

[3] Plaintiffs also invoke the doctrine of "primary jurisdiction" as supporting their claim that the challenged Forest Services actions are unauthorized. The doctrine of primary jurisdiction holds that where it is evident that "Congress, in enacting a regulatory scheme, intends an administrative body to have the first word on issues" in a particular field, courts should abstain from adjudicating such issues when raised in cases before them, and instead should obtain an adjudication of the issue from the relevant administrative body in a manner similar to a federal court's certifying a question to a state court. United States v. General Dynamics Corp., 828 F.2d 1356, 1362 (9th Cir. 1987). As an initial matter, we note that the

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adjudicate the validity of mining claims, since that is a matter over which adjudicative authority is clearly vested in Interior.

doctrine is usually applied to determine whether a federal court may adjudicate an issue. In contrast, plaintiffs' contention here is that primary jurisdiction is vested in one federal agency -- Interior -- such that adjudication of related issues by another federal agency -- Agriculture -- is precluded. In any event, assuming that the doctrine can apply in such contexts, it is quite clear that it has no applicability here.

Whether such primary jurisdiction exists in a particular agency is a question of congressional intent, since Congress is free to allocate such authority as it chooses. See General Dynamics, 828 F.2d at 1363 n.13 (noting "[t]he importance of ensuring Congressional intent to pace the initial consideration of an issue with an agency before finding that judicial deferral is warranted"). Courts of this

circuit have construed the Forest Service's Organic Act as evidencing a congressional intent to authorize the Service to regulate mining activities on national forest lands. See discussion supra. Thus, there can be no question of Agriculture's impinging on Interior's primary jurisdiction.[10]

[4] For the above reasons, we affirm the district court's ruling that the Forest Service enjoys authority to regulate access to mining claims located within national forest lands, and hold that that authority extends both to national forest lands that have been designated wilderness areas and those that have not.

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[10]Plaintiffs also argue that Interior's procedural rules applicable to agency decisions relating to mining claims are superior to Agriculture's in various respects. BB at 19-21. While this may well be true, it clearly has no bearing on whether Congress has authorized Agriculture to regulate ingress and egress to mining claims located on national forest wilderness lands.

IV. EXHAUSTION OF ADMINISTRATIVE REMEDIES WITH RESPECT TO THE WILSON CLAIM

[5] The district court ruled that judicial review of the Forest Service's actions regarding the Wilson claim was not available on the round that plaintiffs had failed to exhaust their administrative remedies with respect to that claim. Plaintiffs challenge that ruling on appeal.

A. THE CHALLENGED FOREST SERVICE ACTIONS

[6] Regarding the Wilson claim, plaintiffs object to the Forest Service's (1) failure to approve motorized access to the claim, and (2) failure to approve a plan of operations while plaintiffs' appeal of the BLM's ruling that the claim was not valid was pending in Interior. As recounted above, plaintiffs made three different filings with the Forest Service in their attempt to begin mineral exploration on the Wilson claim: a plan of

operations, a revised plan of operations, and a notice of intent to file yet another plan of operations. On June 6, 1990, the BLM ruled the Wilson claim null and void. SER at 34. Plaintiffs appealed that ruling to the Interior Department Bureau of Land Appeals. SER at 37. However, at no point did plaintiffs attempt to appeal with the Forest Service the District Ranger's refusal to approve the two submitted plans of operations.

B. EXHAUSTION REQUIREMENTS UNDER THE APA

As noted above, this lawsuit for review of the legality of federal agency action is brought by plaintiffs pursuant to the APA. See supra note 5. Under the APA, review is available where the challenged agency action is "final."[11] In addition,

[11]The APA permits review of either (1) "final agency action" or (2) other types of agency action that Congress has specified by statute are judicially reviewable. 5 U.S.C. § 704. However, here there is no

under the related but distinct doctrine of "exhaustion,"

> an appeal to "superior agency authority" is a prerequisite to judicial review [under the APA] ... when expressly required by statute or when an agency rule requires appeal before review and the administrative action is made inoperative pending that review.

Darby v. Cisneros, 113 S.Ct. 2539, 2548 (1993).

C. THE FOREST SERVICE ADMINISTRATIVE REGULATORY SCHEME

The Forest Service regulations governing the surface use of national forest lands in connection with operations on mining claims provide that, with certain exceptions, "a notice of intent to operate is required from any person proposing to conduct operations which might cause disturbance of surface resources." 36

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contention that any such special, express statutory authorization exists. Thus, APA review is available in this case only if the agency actions in question are "final."

C.F.R. §228.4(a). If the District Ranger determines that the proposed operations are likely to cause a "significant disturbance of surface resources," the operator must file a proposed plan of operations. Id. The District Ranger's decision to require a plan is not directly appealable, because it is not a decision relating to "issuance, denial or administration of [particular] written instruments to occupy and use National Forest System lands." 36 C.F.R. §§ 251.82 & 228.14. Rather, to challenge a decision requiring that a plan be filed, a person must first comply and file a plan. Decisions relating to approval of a plan may then be appealed. 36 C.F.R. § 251.82(a)(4). The regulations specifically provide that it is the position of the Forest Service that, for decisions appealable under the regulations, exhaustion should be required before an

aggrieved party may seek federal court review. 36 C.F.R. § 251.101.

D. ANALYSIS

The district court ruled that the District Ranger's response to plaintiffs' 1990 notice of intent to file a plan of operations was not a final order under the regulations and therefore was not appealable under the APA. ER at 158. This holding appears correct, see Franklin v. Massachusetts, 112 S.Ct. 2767 (1992), and plaintiffs have not challenged it on appeal. As for the District Ranger's refusal to act on the actual proposed plans of operations submitted by plaintiffs in 1988 and 1989, the district court ruled that that action -- or inaction -- was not reviewable on the ground that plaintiffs had failed to exhaust their administrative remedies regarding it. ER at 157.

[7] The court's conclusion that the

District Ranger's failure to act was appealable under the Forest Service regulations appears correct,[12] and the parties do not contest it. As noted above, that Forest Service regulations require exhaustion for those Service rulings that are appealable under the regulations. 36 C.F.R. § 251.101. Thus, under Darby, there is an exhaustion requirement that plain-

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[12]The District Ranger's refusal to act on plaintiffs' proposed plans of operations appears to qualify as a

> written decision[] of [a] Forest Service line officer[] related to issuance, denial, or administration of [certain] written instruments to occupy and use National Forest System lands.

36 C.F.R. § 251.82(a), which are defined as including,

> Approval/non-approval of Surface Use Plans of Operations related to the authorized use and occupancy of a particular site or area.

36 C.F.R. § 251.82(a)(11). Such rulings are appealable under the Forest Service regulations.

tiffs have not satisfied. See Doremus, 888 F.2d at 632 (exhaustion required in order to obtain judicial review under APA of Forest Service action on plan of operations).

Recognizing this, plaintiffs sought to avoid dismissal by arguing that the so-called "futility" exception to the exhaustion requirement applies in this case. BB at 42-45; GB at 20. Cases i this circuit such as El Rescate Legal Serv. v. EOIR, 959 F.2d 742 (9th Cir. 1992), have held that

> there is no requirement of exhaustion where resort to the agency should be futile. SAIF Corp. / Oregon Ship v. Johnson, 908 F.2d 1434, 1441 (9th Cir. 1990). ... [W]here the agency's position on the question at issue "appears already set," and it is "very likely" what the result of recourse to administrative remedies would be, such recourse would be futile and is not required. Id.

El Rescate, 959 F.2d at 747. Plaintiffs

argue that, with respect to the Wilson claim, it would have been futile for them to pursue an administrative appeal challenging the Forest Service's policy of not approving plans of operations until claim validity is ascertained by Interior. They argue that the fact that the Forest Service had already expressed an agency position on this issue in the Forest Service's ruling denying plaintiffs' appeal in the case of the Robert E. claims showed that appealing the District Ranger's refusal to act on the Wilson claim plan of operations would have been a futile gesture. BB at 42-45.

[8] We concur in the district court's conclusion that the futility exception to the exhaustion requirement does not apply in this case on these facts. In its ruling denying plaintiffs' administrative appeal in the Robert E. case, the Forest Service

cited as authority for its decision an administrative rule published in the Forest Service Manual that provides that the Forest Service will not approve a plan of operations for claims located in federal wilderness areas until it determines the claim at issue is valid. See Forest Service Manual § 2816. However, as discussed above, the Wilson claim, although located in a national forest, is not in a wilderness area. Thus, the rule and reasoning on which the Forest Service relied in its ruling on the Robert E. case are clearly of no applicability in the case of the Wilson claim. As such, the Service's ruling in the Robert E. case does not demonstrate that the "agency's position on the question at issue 'appears already set'" as is required for the futility exception to apply. We thus affirm the district court's dismissal of plaintiffs'

claims involving the Wilson claim for failure to exhaust.

V. SUBSTANTIVE VALIDITY OF THE FOREST SERVICE'S DECISIONS UNDER THE APA

[9] In addition to challenging the Forest Service's authority to regulate access to mining claims, plaintiffs challenge the Service's particular rulings and actions on the merits, charging that they are otherwise illegal. The district court rejected al of these arguments, and plaintiffs challenge those rulings on appeal. As we have affirmed the district court's dismissal of plaintiff's claims regarding the Wilson claim for failure to exhaust, remaining before us is only the legality of the Service's actions with respect to the Robert E. and Thunderbolt claims, both of which are located on national forest wilderness lands.

As explained above, see supra note 5, aside from their constitutional claims

which are discussed later, plaintiffs' claims must be construed as having been asserted under the APA. We shall therefore treat plaintiffs' arguments as being asserted under the APA, although plaintiffs sometimes have not framed them this way in their pleadings.

A. THE ROBERT E. CLAIM: FOREST SERVICE RULING REFUSING TO APPROVE MOTORIZED ACCESS PENDING FINAL DETERMINATION OF CLAIM VALIDITY BY THE DEPARTMENT OF THE INTERIOR

1. FOREST SERVICE RULING

[10] As explained above, in approving a plan of operations for the Robert E. claim, the Forest Service modified the plan so as to prohibit use of motorized transport to access the claim during the period while the claim's validity was being evaluated by the Department of the Interior. SER at 56-57. That ruling was affirmed on appeal by the Forest Service. SER at 58-61.

2. ANALYSIS OF GROUNDS ON WHICH PLAINTIFFS CHALLENGE FOREST SERVICE RULING

In the district court, and again on appeal, plaintiffs challenge this ruling, alleging that it violated Interior Department regulations and the Forest Service's own regulations. Charging that these regulations require the Forest Service to apply the same motorized access standard to all mining claims unless and until they are held invalid by Interior, plaintiffs contend that the Service has "unlawfully withheld or unreasonably delayed" such action, in violation of § 706(1) of the APA.

As noted earlier, the challenged rulings regarding motorized access are made pursuant to authority conferred on the Agriculture Department under 16 U.S.C. § 1134(b), which provides that

> In any case where **valid mining claims** or other valid occupancies are wholly within a designated

> national forest wilderness area, the Secretary of Agriculture shall, by reasonable regulations consistent with the preservation of the area as wilderness, permit ingress and egress to such surrounded areas by means which have been or are being **customarily enjoyed** with respect to other such areas similarly situated.

(Emphasis added). Exercising that authority, Agriculture has promulgated regulations that provide, in pertinent part

> (b) Holders of unpatented mining claims **validly** established on any National Forest Wilderness prior to inclusion of such unit in the National Wilderness Preservation System shall be accorded the rights provided by the United States mining laws as then applicable to the National Forest land involved. ... Persons conducting operations as defined in § 228.3 in National Forest Wilderness shall comply with the regulations in this part. Operations shall be conducted so as to protect National Forest surface resources in accordance with the general purpose of maintaining the National Wilderness Preservation System unimpaired for future use and enjoyment as wilderness and to preserve its wilderness character, consistent with the

> use of the land for mineral location, exploration, development, drilling, and production ..., including, where essential, the use of mechanized transport, aircraft or motorized equipment.
>
> (c) Persons with valid mining claims within National Forest Wilderness shall be permitted access to such surrounded claims by means consistent with the preservation of National Forest Wilderness which have been or are being customarily used with respect to other such claims surrounded by National Forest Wilderness. No operator shall construct roads across National Forest Wilderness unless authorized in writing by the Forest Supervisor in accordance with § 228.12.

36 C.F.R. § 228.15 (emphasis added). The Forest Service construes the references to "validity" contained in the statute and in the agency's own implementing regulations as meaning that the access referred to need only be granted if and when it is determined that the claim in question is, in fact, "valid." See Forest Service Manual § 2816.

[11] Plaintiffs argue that this interpretation runs counter to Interior Department regulations and to the Forest Service's own regulations. Plaintiffs cite 43 C.F.R. § 4.21(a), a regulation establishing certain procedures applicable in Interior Department administrative proceedings. It provides

> Effect of decision pending appeal.
>
> Except as otherwise provided by law or other pertinent regulation, a decision will not be effective during the time in which a person adversely affected may file a notice of appeal, and the timely filing of a notice of appeal will suspend the effect of the decision appealed from pending the decision on appeal. ....

43 C.F.R. § 4.21(a) (1992).[13] Plaintiffs

[13]On January 19, 1993, while the instant litigation was pending, the Interior Department abandoned this policy of granting automatic stays of decisions pending administrative appeal. Under an amended regulation issued on that date, such stays must instead be applied for and may be granted or denied in the discretion of the agency. See 43 C.F.R. § 4.21(a)

argue that this regulation requires the Forest Service to hold of on treating any claim as invalid unless and until an Interior Department ruling of invalidity has been affirmed under administrative appeal. The district court rejected this argument, reasoning that

> Plaintiffs have misconstrued the meaning of this regulation. Section 4.21 sets forth general rules concerning the appeals process within the Interior Department. Plaintiffs present no authority to establish that, under § 4.21(a), the effect of a decision of the Department of Agriculture is stayed by the initiation of contest proceedings before the Interior Department. In the absence of decisional or statutory law, I cannot interpret a governmental regulation in a manner inconsistent with its shared objective.

ER at 167.

(1993). Since it was the earlier version of the regulation that was in force at the time of the administrative actions challenged in this lawsuit, we review those actions' legality under the former rule.

We concur in this conclusion. The Interior Department regulation dos not purport to instruct other agencies such as Agriculture on how to treat putative mining claims during the pendency of appeals in validity proceedings. Moreover, even if the regulation did purport to do so, plaintiffs have cited no authority for the proposition that one agency may promulgate regulations that bind another agency in that way. The issue here concerns how an agency should treat a putative claim during the interim while validity is being assessed. Interior has taken one position, Agriculture another, and we see no reason why such a divergence is impermissible as a mater of law.

Plaintiffs further argue that the policy of refusing to approve motorized access while validity proceedings are pending runs contrary to the Forest

Service's own regulations codified at 36 C.F.R. 228.5(a).[14] Plaintiffs apparently construe the Forest Service refusal to

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[14]Operations shall be conducted in accordance with an approved plan of operations, except as provided in paragraph (b) of this section and in § 228.4(a),(b) and (e). A proposed plan of operation shall be submitted to the District Ranger, who shall promptly acknowledge receipt thereof to the operator. The authorized officer shall, within thirty (30) days of such receipt,1 analyze the proposal, considering the economics of the operation along with the other factors in determining the reasonableness of the requirements for surface resource protection, and;

(1) Notify the operator that he has approved the plan of operations; or

(2) Notify the operator that the proposed operations are such as not to require an operating plan; or

(3) Notify the operator of any changes in, or additions to, the plan of operations deemed necessary to meet the purpose of the regulations in this pat; or

(4) Notify the operator that the plan is being reviewed, but that more time, not to exceed an additional sixty (60) days, is necessary to complete such review, setting forth the reasons why additional time is needed....

36 C.F.R. § 228.5(a).

approve motorized claim access until validity is established as a policy whereby plans of operations proposing motorized access are not acted on wile validity is being investigated. This, they reason, violates Forest Service regulations regarding timely processing of plans of operations. However, this argument is predicated on a faulty assumption. As the record in the Robert E. case demonstrates, the Forest Service did rule in a timely fashion on the proposed plan of operation. The Forest Service, wielding its authority under 36 C.F.R. § 228.5(a)(3), approved the plan subject to certain modifications, among those being that only non-motorized access would be permitted while validity is pending. See SER at 56. Thus, the challenged policy is not inconsistent with these procedural provisions.

Finally, plaintiffs argue that the policy of refusing to approve motorized access while validity proceedings are pending violates plaintiffs' property rights in the mining claim. Plaintiffs cite cases including United States v. Barrows, 404 F.2d 749 (9th Cir. 1968), cert denied, 394 U.S. 974 (1969), for the proposition that

> [the miner's] right to the claim, unless and until the claim is finally declared void, is a property right.

Id. at 752 (citing Adams v. Witmer, 271 F.2d 29, 33 (9th Cir. 1958). However, insofar as plaintiffs mean to argue that the Forest Service's policy infringes their property right in the claim without due process in violation of the Fifth Amendment, that issue is addressed below. Similarly, if plaintiffs mean to assert that they have had this property interest abridged in violation of the takings clause

of the Fifth Amendment, that argument too is addressed below.[15]

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[15]We note that the case on which plaintiffs chiefly rely, Barrows, contained a critical qualification to the above-quoted language:

> It must be remembered, however, that the Government is the underlying property owner and, as such, has interests entitled to protection. Balancing the interests of each, we think the court had power to prevent defendants from causing irreparable damage to the land, pending determination of the validity of defendants' claim. We find nothing in the record which convinces us that the district court abused this power in granting the temporary injunction.

Barrows, 404 F.2d at 752. In Barrows, the district court had issued a preliminary injunction restraining the miner from damaging the surface lands and property of a putative claim located in a national forest pending administrative determination of the claim's validity by the Interior Department. Id. at 750. The Barrows court was thus faced with a question strikingly similar to that before us here: whether in mining claims located in national forests, activities on or around the claim that are incidental to mining may permissibly be regulated or prohibited, pending determination of claim validity, in order

[12] As plaintiffs have not called to the court's attention any statute that would prohibit the challenged policy, we affirm the district court's entry of summary judgment for defendants on plaintiffs' claim that the policy amounted to "unlawfully withheld or unreasonably delayed" agency action, in violation of § 706(1) of the APA. We hold that the Forest Service policy of refusing to approve motorized access to claims located in national forest wilderness lands, unless

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to protect the claim and surrounding federal lands from damage. And the Barrows court, though holding that such claims constitute property rights "unless and until the claim is finally declared void," nonetheless answered that question in the affirmative. That ruling is a strong indication that, on the merits, a takings clause challenge to the Forest Service policy of denying motorized access pending determination of claim validity would not succeed, for this court has interpreted the property right in an unvalidated claim as being one that may permissibly be restricted pending determination of validity, in order to guard against damage to the claim and surrounding land.

and until claim validity is established, is consistent with the governing statutes and agency regulations and thus is valid and enforceable.

B. THE THUNDERBOLT CLAIM: FOREST SERVICE RULING DENYING MOTORIZED ACCESS.

1. BACKGROUND: THE FOREST SERVICE ACCESS REGULATIONS

As noted above, Forest Service regulations provide that miners should be permitted access to claims that are surrounded by national forest wilderness lands "by means consistent with the preservation of National Forest Wilderness which have been or are being customarily used with respect to such other claims," 36 C.F.R. § 228.15(c) (emphasis added), and that "the use of mechanized transport ... or motorized equipment" need not be permitted unless "essential" to mining activities. 36 C.F.R. § 228.15(b) (emphasis added). As these regulations draw their operative

language nearly verbatim from the statute, there can be no question that the regulations are a valid exercise of the agency's delegated rulemaking authority. However, plaintiffs challenge on other grounds the validity of the Forest Service's application of these regulations in the case of the Thunderbolt claim.

2. FOREST SERVICE RULINGS

In its 1989 ruling on plaintiffs' appeal of its denial of permission for motorized access to the Thunderbolt claim, the Forest Service found (1) that the trails that plaintiffs proposed to use for motorized access to the claim had no been used by motor vehicles since the area was designated a wilderness area in 1984, ER at 84; and (2) that the scope of the proposed operation was relatively small, and that consequently the volume of material and equipment that would need to be transported

to the claim was not great. ER at 85. On the basis of these findings, the Service concluded that motorized access was not "essential" for the operation of the claim under 36 C.F.R. § 228.15(b), and therefore reaffirmed its earlier denial. ER at 85. In the second 1990 appeal of the same ruling, the Forest Service further found that the scope of the proposed operations was relatively small, and that the equipment that plaintiffs proposed using -- a five-inch suction dredge -- was sufficiently small in size that it could be transported using pack horses. (A five-inch dredge had been carried in by pack horse when the claim was examined by the Forest Service to assess its validity.) On the basis of this finding, the Service concluded that motorized access was not being "customarily used with respect to other such claims," and that therefore

motorized access need not be granted under 36 C.F.R. § 228.15. ER at 97.

Plaintiffs also argued that the existing trails that they proposed to expand and then use to gain motorized access to the claim were public right-of-ways under Revised Statutes ("R.S.") § 2477. On this basis, they contended that the Forest Service could not preclude them from using the trails to gain motorized access to their claim and that, moreover, they were exempted from having to obtain Forest Service approval of their plan to use the trails under 36 C.F.R. § 228.4(a), which states:

> The requirements to submit a plan of operations shall not apply:
>
> > (i) To operations which will be limited to the use of vehicles on existing public roads or roads used and maintained for National Forest purposes.

In its 1989 ruling on the first appeal, the Forest Service rejected this argument on the round that the trails in question did not qualify as public highways under the legal standard applied under R.S. § 2477. ER at 84. In its 1990 ruling on second appeal, the Service also ruled that, in any event, the 36 C.F.R. § 228.4(a) exemption from the requirement to submit a plan of operations did not apply because plaintiffs' proposed mining plan was not limited to existing roads, but rather would involve clearing trails that had not been used for ten years to restore them to a state in which motor vehicles could travel them. ER at 96.

3. ANALYSIS OF GROUNDS ON WHICH PLAINTIFFS CHALLENGE FOREST SERVICE RULINGS

Plaintiffs challenge the above rulings on various grounds. First, they challenge the fact-finding on the basis of which the

Service concluded that motorized access was neither "essential" to the operation of the claim under 36 C.F.R. § 228.15(b), nor "customarily used with respect to other such claims" under 36 C.F.R. 228.15(c). However, federal court review of agency fact-finding -- other than fact-finding made in the course of formal adjudications which the instant proceedings are not -- is conducted under the deferential "arbitrary and capricious" standard, pursuant to 706(2)(A) of the APA. Mt. Graham Red Squirrel v. Espy, 986 F.2d 1568, 1571 (9th Cir. 1993); II Davis & Pierce, Administrative Law Treatise § 11.4 (3d ed. 1994). Under this deferential review the court is

> called upon to determine only whether the [agency's] decisions ... were "based on a consideration of the relevant factors" and did not betray "clear errors in judgment." Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378 (1989). Review under this standard is to be "searching and

> careful," but remains "narrow," and a court is not to substitute its judgment for that of the agency. Id.

Mt. Graham, 986 F.2d at 1571. As explained above, the Forest Service concluded, based on the fact that the Service's own examiner had carried in a five-inch dredge by pack horse when evaluating the claim, and the fact that the operation proposed was a small one for which plaintiffs also planned to use a five-inch dredge, that motorized access was not "essential" to the mining operation under 36 C.F.R. § 228.15(b). Regarding the "customarily used" standard of 36 C.F.R. § 228.15(c), the record also shows that the access rails plaintiffs proposed using have been blocked by a gate and closed to traffic since 1984. Since that date the trails have not been maintained by the Forest Service, and consequently they are returning to a natural condition. See ER at 172-73.

[13] Moreover, plaintiffs have pointed to no evidence in the administrative record that would tend to show motorized access is, in fact, "essential" to the operation of this claim or is "customarily used with respect to other such claims." In the absence of such record evidence, there can be no question but that the challenged agency ruling holding that motorized access is not required under 36 C.F.R. § 228.15 is not arbitrary and capricious in violation of § 706(2)(A) of the APA.

Plaintiffs also argued in the district court that the Forest Service acted improperly in ruling that the trails in question do not qualify as public highways under R.S. § 2477. Plaintiffs assert that authority to decide whether roads qualify as public highways, under R.S. § 2477 is vested in the Department of the Interior. The district court rejected that conten-

tion, ruling the Forest Service may properly rule on such issues in the course of carrying out its duty to review and approve plans of operations. ER at 170. Plaintiffs raise this argument again on appeal, charging that the Forest Service improperly ruled on this issue which might otherwise afford them a legal basis for circumventing the Service's ban on motorized access.

[14] We interpret this argument as a claim that the Forest Service's ruling regarding the Thunderbolt claim was "in excess of statutory jurisdiction, authority, or limitations," in violation of § 706(2)(C) of the APA. We reject this claim on the round urged by the government in its brief on appeal: that regardless whether the trails in question are public highways under R.S. § 2477, they are nonetheless subject to the Forest Service

regulations. This court held in United States v. Vogler, 859 F.2d 638 (9th Cir. 1988), cert. denied, 488 U.S. 1006 (1989), that the statutory authority conferred on the National Park Service under 16 U.S.C. § 1 to regulate national parks empowers the Park Service to regulate the us of R.S. § 2477 roads that are located within park areas. 859 F.2d at 642. As 16 U.S.C. § 551 confers on the Department of Agriculture similar authority to regulate national forest areas, Vogler indicates that encompassed within that grant is the authority to regulate use of R.S. § 2477 roads where such is necessary to carry out Agriculture's statutory duty to protect national forests against "depredations."

Finally, plaintiffs challenge the Forest Service ruling as violating certain provisions of the mining laws. We interpret this argument as a claim that the

ruling was "in excess of statutory jurisdiction, authority or limitations," in violation of § 706(2)(C) of the PAP, or else "not in accordance with law," in violation of § 706(2)(A) of the APA. Plaintiffs cite 30 U.S.C. § 612(b), which provides, in pertinent part

> Rights under any mining claim ... shall be subject, prior to issuance of patent therefor, to the right of the United States to manage and dispose of the vegetative surface resources thereof and to manage other surface resources thereof.... Any such mining claim shall also be subject, prior to issuance of patent therefor, to the right of the United States, its permittees, and licensees, to use so much of the surface thereof as may be necessary for such purposes or for access to adjacent land: Provided, however, That any use of the surface or any such mining claim by the United States, its permittees or licensees, shall be such as not to endanger or materially interfere with prospecting, mining or processing operations or uses reasonable incidental thereto....

(Emphasis added). Plaintiffs argue that

motorized access to the claim is "[a] use[] reasonably incidental [to mining]" and that the Service's ruling "materially interfere[s] with" that use in violation of this provision. Plaintiffs' position seems to be that Forest Service actions regulating access to claims located within national forest lands must comply not only with the "means ... customarily enjoyed" standard of 16 U.S.C. § 1134(b) and 36 C.F.R. § 228.15(c), and the "where essential" standard of 36 C.F.R. § 228.15(b), but also with the "materially interfere" standard of 30 U.S.E. § 612.

[15] It is true our circuit has held that Forest Service regulation of activities on mining claims must comport with the standard set out in 30 U.S.C. § 612. See United States v. Doremus, 888 F.2d 630, 633 (9th Cir. 1989) (upholding Forest Service requirement that claim

holders obtain permit before beginning operations on grounds that such Forest Service regulation did not "materially interfere" with mining operation), cert. denied, 498 U.S. 1046 (1991). However, by its terms, 30 U.S.C. § 612 addresses only "use of the surface of any ... mining claim by the United States" (emphasis added). We see no basis for construing the statute as limiting Forest Service regulation of activities on national forest lands outside of the boundaries of the mining claim, particularly in view of the fact that Congress subsequently enacted a statute specifically addressing that issue -- 16 U.S.C. § 1134(b). We therefore affirm the district court's rejection of this argument on the round that the "materially interfere" standard of 30 U.S.C. § 612 does not apply to actions taken by the government to regulate mining-related activities that

occur on national forest lands outside of the boundary of the mining claim.

VI. TAKINGS CLAIM

Plaintiffs also argue the Forest Service's denial of motorized access to their claims effects a taking of private property for public use without just compensation in violation of the Takings Clause of the Fifth Amendment. The district court concluded that the takings claim failed because it was not ripe and because, even if it were, subject matter jurisdiction over it would likely lie in the U.S. Court of Federal Claims.

Plaintiffs argue that the district court erred in ruling that jurisdiction over their takings claim lies exclusively in the Court of claims, 28 U.S.C. § 1346(a)(2),[16] the "Little" Tucker Act,

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[16]Section 1346(a)(2) states:

The district courts shall have original

vests the district courts with jurisdiction to hear suits alleging constitutional claims against the United States so long as the plaintiff does not seek damages in excess of $10,000. Plaintiffs contend that since they seek only injunctive and declaratory relief in this action, jurisdiction over their takings claim may properly lie in the district court. The Supreme Court has instructed that

> Equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking. Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 697 n.18 (1940). The Fifth Amendment does not require that compensation precede the taking. Hurley v. Kincaid, 285 U.S. 95, 104 (1932). Generally, an individual claiming

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jurisdiction, concurrent with the United States Courts of Federal Claims, of ... Any ... civil action or claim against the United States, not exceeding $10,000 in amount, founded ... upon the Constitution....

> that the United States has taken his property can seek just compensation under the Tucker Act, 28 U.S.C. § 1491. United States v. Causby, 328 U.S. 256, 267 (1946) ("If there is a taking, the claim is 'founded upon the Constitution' within the jurisdiction of the Court of Claims to hear and determine"); Yearsley v. Ross Construction Co., 309 U.S. 18, 21 (1940).

Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1016-17 (1984). Ruckelshaus thus held that a suit for equitable relief to enjoin a taking cannot be maintained where a post-deprivation suit for damages would be available. Ruckelshaus further held that where an action alleged to be a taking is carried out by the government pursuant to statutory authority, a suit for money damages may be maintained under the Tucker Act unless the statute in question evidences a congressional intent to (withdraw[] the Tucker Act grant of jurisdiction to the Court of Claims to hear a [takings] suit involving the [statute]."

467 U.S. at 1017 (quoting Regional Rail Reorganization Act Cases, 419 U.S. 102, 126 (1974) (emphasis in original)). Here, it does not appear, nor have plaintiffs argued, that 16 U.S.C. § 1314(b) or the other statutes pursuant to which the Forest Service has acted evince such a congressional intent to preclude a Tucker Act remedy. In view of that fact, plaintiffs may not maintain a suit for equitable relief, but rather are limited to the exclusive remedy of a suit for money damages under the Tucker Act.

[16] Because plaintiffs seek only injunctive and declaratory relief on their takings claim, its dismissal was therefore appropriate. Moreover, even if plaintiffs had sought leave to amend to add a prayer for money damages, jurisdiction over such an amended claim would like exclusively in the Court of Claims. The "Little" Tucker

Act vests the district courts with jurisdiction over suits against the federal government only where plaintiffs seek less than $10,000 in damages. See 28 U.S.C. § 1346(a)(2). Since plaintiffs in their complaint allege damages in excess of $10,000, see ER at 17, they are disqualified from suing in the district court.

We therefore affirm the district court's dismissal of plaintiff's takings claim on the round that the district court had no jurisdiction to hear the claim under the Little Tucker Act. As this ground is a wholly adequate basis on which to affirm the district court's dismissal of this claim, it is not necessary for us to address the ripeness ground on which the district court relied as an additional basis for its dismissal.

VII. PROCEDURAL DUE PROCESS CLAIMS

Plaintiffs also argue that because

they were accorded no hearing before the Forest Service issued its rulings refusing to approve motorized access to the claims, their due process rights were violated. The magistrate's findings and recommendations and the district court opinion do not expressly address this claim. However, as it is clear that the claim fails as a matter of law, we may nonetheless affirm the district court's entry of summary judgment for defendants on this claim.

The Due Process Clause of the Fifth Amendment forbids the federal government from depriving persons of "life, liberty, or property, without due process of law." Since life and liberty are not at issue in this case, a threshold question relevant to whether plaintiffs can state a due process claim is whether they have been denied a property interest. "An interest must have its source in positive law -- state common

law, a statute, or a contract -- in order to be characterized as 'property' for due process purposes." II Davis & Pierce, Administrative Law Treatise § 9.4 at 27. Thus, in the present context, plaintiffs must have been denied a statutorily conferred "property interest" in order for this threshold requirement to be met.

We have concluded above that 30 U.S.C. § 612 does not vest claim holders with a property right to any particular type of access to their claims across national forest wilderness lands surrounding their claims. The only laws imposing substantive standards in this area are 16 U.S.C. § 1314(b) and the Forest Service regulations implementing that statute. Thus, only if those laws confer a property right to motorized access can plaintiffs possibly state a due process claim.

It is not necessary for us to resolve

this question in order to affirm entry of summary judgment for defendants on this claim. This is the case because, even if plaintiffs had a constitutionally protected property interest in having the statutory access standard fairly and accurately applied, it seem sufficiently clear that the procedural protections provided by the Forest Service would satisfy constitutional requirements for such proceedings.

The specific aspects of the Forest Service procedures that plaintiffs object to are (1) the Service's failure to provide an evidentiary hearing at the initial decision stage, requiring instead that pleadings and evidence be submitted in written form; (2) the alleged inadequacy of the Forest Service's explanation of the reasons for its rulings; and (3) the Service's failure to provide for an evidentiary hearing at the administrative

appeal stage. BB at 38-39. The complaint regarding the reasons offered by the Forest Service for its decisions surely has no merit, for the Service's administrative rulings on plaintiffs' administrative appeals offered detailed explanations and cited specific statutes and regulations as authority. As to the complaint regarding the Service's failure to provide evidentiary hearings, plaintiffs cite Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978), for the proposition that evidentiary hearings are required by due process. However, Pence, which addressed the due process requirements for BLM administrative proceedings adjudicating Native Alaskan land rights, held that informal oral evidentiary hearings were required in such cases only because many of the claimants involve were poorly educated, unsophisti-cated persons who would not be able to

comply with complicated formal pleading requirements. Id. at 741. As here there is no record evidence showing, nor reason to believe, that holders of mining claims are similarly unable to pursue their claims by filing written pleadings, Pence is inapposite.

Because plaintiffs have cited no authority showing that the Forest Service's detailed administrative procedures -- which include provisions for administrative appellate review of agency decision, see 36 C.F.R. §§ 251.80-252.101 -- do not conform with procedural due process requirements, we affirm the district court's grant of summary judgment for defendants on this claim.

VIII. CONCLUSION

For the foregoing reasons, the district court's decision granting summary judgment for defendants on all counts, and

denying summary judgment for plaintiffs is AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 93-35051
CT/AG#: CV-91-00003-DCA

LEROY CLOUSER; SHARON CLOUSER (Owners of the Robert E. Mining Claims); CARL E. SETERA; JUDITH M. SETERA; ANTHONY S. SETERA; LOIS A. SETERA (Owners of the Thunderbolt Mining Claims); GARY HOEFLER; DON WURSTER; CAMERON ANDERSON; ROBIN ANDERSON (Owners of the Wilson Mining Claim)

Plaintiffs-Appellants,

v.

EDWARD R. MADIGAN, Secretary of Agriculture, United States of America; DALE ROBERTSON, Chief Forester, Forest Service; JOHN F. BUTRUILLE, Regional Forester; PACIFIC NORTHWEST REGION; JEFF BLACKWOOD, Forest Supervisor; UMATILLA NATIONAL FOREST; CRAIG SMITH DIXON, District Ranger, et al

Defendants-Appellees

APPEAL FROM the United States District Court for the District of Oregon (Portland).

THIS CAUSE came on to be heard on the Transcript of the Record from the United

States District Court for the District of Oregon (Portland)
and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered December 7, 1994.
costs taxed

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

LEROY CLOUSER, et al. Plaintiffs, v EDWARD MADIGAN, Secretary of Agriculture, et al., Defendants.	Civil No. 91-3-AS ORDER

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MARSH, Judge.

Magistrate Dale filed his Findings and Recommendation on September 10, 1992. The matter is now before me pursuant to 28 U.S.C. § 636(b)(1)(B) and Fed. R. Civ. P. 72(b). When either party objects to any portion of the Magistrate's Findings and Recommendation, the district court must make a de novo determination of that portion of the Magistrate's report. See 28 U.S.C. § 636(b)(1)(C); McDonnell Douglas Corp. v. Commodore Business Machines, Inc., 656 F.2d 1309, 1313 (9th Cir. 1981), cert. denied, 455 U.S. 920 (1982).

Plaintiffs have filed timely objections. I have, therefore, given the file of this case a de novo review. Plaintiff raises 11 objections to Judge Dale's Findings and I will address each of these in turn.

Plaintiffs' Objections

1. Background

Plaintiffs object to Judge Dale's

"background section" on the ground that Judge Dale omitted several key facts from plaintiffs' "statement of facts." This objection is denied. First, there is no requirement that a Judge recite all relevant facts in the background section of an opinion. I have reviewed plaintiffs' amended statement of material facts submitted in support of their motion for summary judgment, as well as the complaint and administrative records, and find that Judge Dale adequately summarized the pertinent facts. To the extent there are omissions, there is no prejudice given the broad scope of de novo review.

Defendants' correction to the date on page 5 and proposed clarification of the statement on pages 6-7 of Judge Dale's Findings are noted and adopted.

2. Motion to Strike the La Moure Affidavit

Plaintiffs object to Judge Dale's

recommendation that Bronson La Moure's affidavit be stricken because it is beyond the scope of the administrative record. Plaintiffs contend that La Moure's affidavit was not intended to supplement the record, but rather is proffered as evidence of the inter-departmental conflict between the Forest Service and the Department of the Interior.

La Moure, a retired Forest Service employee, explains his understanding of how the Department of the Interior and the Department of Agriculture shared responsibilities for administering National Forest laws, Wilderness laws and Mining laws. La Moure feels that, during his employment, Forest Service practices were not uniform and often were contrary to internal policies. He further opines that, in general, disputes over mining claim rights should be determined by the Department of the Interior. La Moure does

not address the specific issues or facts in this case.

Based on the content of the affidavit, I accept plaintiffs' proffer that this is not an addition to the administrative record, but is offered only in support of plaintiffs' legal contention that the Forest Service lacked authority to determine whether the roads to the Thunderbolt and Robert E. Mines were "public highways" under R.S. 2477. Although I find such lay opinion of legal conclusions of questionable relevancy, I have considered the affidavit and accept it for whatever relevancy it has to this action. Accordingly, plaintiffs' objection to Judge Dale's recommendation that I rant defendants' motion to strike is ALLOWED and the motion is DENIED.

3. Administrative Review

Plaintiffs object to Judge Dale's general discussion of the process of

administrative review of Forest Service decisions on the ground that this discussion is incomplete. Plaintiffs argue that the magistrate should also have addressed administrative review of decisions of the Department of the Interior.

First, I note that the decisions of most government agencies are subject to administrative review as provided by the Administrative Procedures Act, 5 U.S.C. §§ 706, et seq., so that this omission was immaterial. Second, plaintiffs' consistent argument from their complaint, through their motions and to their objections, is that they are not challenging any decision of the Department of the Interior and in fact, believe that the Department of the Interior should have been deciding issues determined by the Forest Service. Thus, I see little relevance to the fact that the decisions of the Department of the Interior are also subject to administrative review.

Accordingly, plaintiffs' objection is denied.

4 & 5. Exhaustion of Administrative Remedies--Wilson Claim

Plaintiffs object to Judge Dale's finding that they have failed to exhaust administrative remedies with respect to the Wilson claim on the basis that "prudential exhaustion" has been met by the denial of access to the Robert E. Claim.

First, I find that the unique nature of each of these mining claims precludes application of the "prudential exhaustion" or "futility" doctrine. Second, I concur with Judge Dales' finding that plaintiffs have failed to exhaust administrative remedies since they have not filed a plan of operations with the Forest Service, and thus, there has been no rejection of a

plan.[1] Accordingly, plaintiffs' objection is denied.

5. Denial Pending Validity Determination[2]

Plaintiffs further object to Judge Dale's findings with respect to the Wilson claim because he failed to address their challenge the Forest Service's policy that it will not approve mining plans until the Department of the Interior issues a deter-

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[1]I note that the issue pending before the IBLA regarding the validity of the Wilson claim is distinct from the issue before the Forest Service of whether plaintiffs may have motorized access to the claim. Defendants contend and plaintiffs do not dispute that no plan was filed following plaintiffs' "notice" and the Ranger's directive to file a plan of operations.

[2]Plaintiffs' fifth objection reiterates their claim that any administrative appeal regarding the Wilson claim would be "futile" and, by reference to pages 21-23 of their memorandum in support of their motion for summary judgment, raise the issue of whether the Forest Service violated the law by withholding further consideration of plaintiffs' right of access pending a determination of the validity of their claim. The second portion of the fifth objection is addressed, infra.

mination of claim validity. 36 C.F.R. § 228.15(c).

First, I find that Judge Dale did address this issue with respect to the Robert E. and Thunderbolt claims at pages 20-23 of his Findings and Recommendation. I agree with Judge Dale that he did not need to analyze this argument as it related to the Wilson claim once he determined that jurisdiction was lacking due to plaintiffs' failure to exhaust administrative remedies.

Second, I agree with Judge Dale's analysis and find that the Forest Service regulation limiting plan approval to "valid" minding claims is not an interference with the jurisdiction of the Department of the Interior, nor does it constitute a violation of the general statutes recognizing the mining rights of unpatented claims. 30 U.S.C. § 26.

I further find that plaintiffs' reliance upon Northern Alaska Environmental

Center (NAEC) v. Lujan, 872 F.2d 901 (9th Cir. 1989) in support of its contention that the Forest Service may not suspend plan approval pending a validity determination is misplaced. In NAEC, the court held that, under the Mining in Parks Act, 16 U.S.C. § 1902, the Secretary of the Interior need not conduct a mineral examination to determine whether an existing mineral claim is valid prior to approval of a plan of operations. Id., at 904. The Court found that the Act left this question to the Secretary to determine on a case by case basis. Id. The court did not address the issue raised by plaintiffs regarding the Forest Service's authority to suspend plan approval pending a DOI validity proceeding, nor does it address the Forest Service's responsibility under the Wilderness Preservation Act to "preserve" and "protect" areas within the National Wilderness Preservation System. 16 U.S.C.

§ 1131, et. seq.

Accordingly, I adopt Judge Dale's analysis at pages 20-23 and plaintiffs' objection is denied.

6. Misstatements of Claims

Plaintiffs object to Judge Dale's summary of their claims for relief relating to the Robert E. and Thunderbolt mining claims on the basis that he misstates and overstates their arguments. Specifically, plaintiffs note that they agreed that their mining rights, including the rights of egress and ingress, are subject to some regulation by the Forest Service. It is simply the scope and extent of that regulation that plaintiffs challenge.

I find that Judge Dale adequately summarized plaintiffs' claims, but plaintiffs' objection is noted and in addressing their objections to his legal conclusions, I will be sensitive to this distinction.

7(a). 8, & 9. The Mining Act "bars" application of the Wilderness Act, 16 U.S.C. § 11134(b)

Plaintiffs object to the magistrate's failure to address their argument that 30 U.S.C. § 22, 26 and 612 "bar" the Forest Service from applying 16 U.S.C. § 1134(b) to their activities. Plaintiffs argue that the issue of whether the roads they propose to use are "public highways" under Revised Statute 2477, cannot be judged under § 1134(b) because their mining claims predate inclusion of land in wilderness areas. I agree that this specific argument is not fully addressed in the findings and so I will address it here.

Title 30 is directed at Mineral Lands and Mining and establishes the Bureau of Mines as a part of the Department of the Interior. 30 U.S.C. § 1. Section 22 of Title 30 provides that "all valuable mineral deposits in lands belonging to the

United States . . . shall be free and open to exploration and purchase." Section 26 provides that locators of mineral veins, lodes and ledges "shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations." Section 612 reserves to the United States, the use of the surface and surface resources with respect to unpatented mining claims. Subsection (c) "precludes the exploitation of surface resources by a locator 'except to the extent required' for . . . mining . . . and uses reasonable incident thereto."

Neither party has cited, nor have I been able to find, any cases which addresses the issue raised by plaintiffs. However, a plain reading of the statutes reveals nothing in 30 U.S.C. § 22, 26 or 612 which would bar the Forest Service from using 16 U.S.C. § 1134(b) to determine whether it should allow motorized access

across public forest land to an unpatented mine. To the extent that plaintiffs enjoy "exclusive possession" under Title 30, that possession is limited to the land on which the mine is located and does not extend to adjoining public lands used for ingress and egress.

In addition, as I understand plaintiffs' argument at pages 12-19 of their memoranda in support of their motion for summary judgment, plaintiffs contend that former section 1133(d) of Title 16, which provides that the Secretary of Agriculture had to approve motorized access "where essential," should apply in lieu of the more restrictive language found in 1134(b) which provides that the Secretary may approve access if the means proposed is of a type "customarily enjoyed with respect to other such areas similarly situated." However, section 1133(d)(3) expired by its own terms on December 31, 1983 and contains

no "grandfather" clause for unpatented claims which pre=exist inclusion within wilderness areas. Thus, based upon a plain reading of the statute, I find that the Forest Service acted within its statutory authority when it applied 1134(b) to plaintiffs' access requests and that plaintiffs are not entitled to review under the standard set forth in 1133(d)(3). I also agree with defendants' argument that this authority is consistent with the authority granted to the Forest Service in the Public Lands Act to administer rights of way on public forest land. 43 U.S.C. § 1761(b)(3).

7(b). Application of 16 U.S.C. 472

Plaintiffs also object to the magistrate's "fail[ure] to discuss the distinction between the regulation of the road use as opposed to the determination of the right to use the road for mining purposes." (emphasis in original). Plaintiffs argue

that 16 U.S.C. § 472 "bars" the Forest Service from determining their rights of egress and ingress to their mining claims.[3]

Section 472 provides that the Secretary of Agriculture shall execute laws affecting public lands reserved under section 471 "excepting such laws as affect the surveying, prospecting, locating, [or] entering . . . any such lands."

First, with the historical and structural background provided by Judge Karlton's excellent opinion in United States v. Fuller, Civ. No. S-83-850-LKK (E.D. Cal. 1987), I agree with plaintiffs that there is a difference between regulation of the type of access and the determination of the validity of one's

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[3]At page 9 of their objections, plaintiffs refer to 30 U.S.C. § 472. Because that statute was repealed, and because plaintiffs make a similar argument at page 15 citing 16 U.S.C. 472, I have assumed that the latter citation is what was intended.

rights as appurtenant to a mining claim. I also agree with plaintiffs that the manner of access is subject to review by the Forest Service, while claim validity clearly falls within the province of the Department of the Interior. However, plaintiffs do not allege, nor do I find, any indicating in the record that the Forest Service has directly determine or attempted to determine plaintiffs' ownership rights in the Robert E. or Thunderbolt claims. The Forest Service's role has been limited to referring the issue of claim validity to the Department of the Interior and suspending approval of motorized access pending the validity determinations. Further, to the extent that the Forest Service's actions have an indirect effect on plaintiffs' "rights" under their mining claims, I find nothing in the statutes to prevent this and in fact, find that the Wilderness Preservation

Act and the Forest Conservation Act strongly suggest that the Forest Service must take this action to ensure that its approval of a plan or project does not result in the "destruction" and "degradation" of the public forests. See 16 U.S.C. 551, and 16 U.S.C. 1131.

7(c). Valuation of Mineral Production

Plaintiffs object to the magistrate's reference to their failure to rebut defendants' contentions regarding the value of mineral deposits on the Robert E. and Thunderbolt claims. F & R pages 18-19. I note that the magistrate's discussion on these pages is really just a recap of the parties' arguments on the underlying merits. Whether the Robert E. or Thunderbolt mining claims have valuable mineral deposits are matters within the province of the Department of the Interior and relate to the continued "validity" of the claims. Thus, I accept plaintiffs'

objection to the extent that I make no findings regarding the existence of mineral rights on the Robert E. and Thunderbolt claims and leave those issues for determination by the Department of the Interior.

7(d). "Exclusive Jurisdiction"

Finally, plaintiffs object to the magistrate's rejection of their argument that the Interior Department has "exclusive jurisdiction" over "access disputes which materially impact mining rights."

First, I find that Judge Dale correctly concluded that plaintiffs' citation to the Interior Department response to interrogatories was incorrect. Nowhere in the Department's response to a question #7 do they claim to have "exclusive" jurisdiction, nor do they make any specific reference to the scope of their jurisdiction over these particular claims. Based upon the structure of the statutes

and the complementary jurisdiction of the Interior Department and the Forest Service as more fully set forth in Judge Karlton's opinion in Fuller, I find that it is the nature of the issue presented (i.e. mode of access), not the effect of the determination which determines the appropriate agency forum. Thus, the fact that the Forest Service's rejection of a particular method of access may have a "material impact" on the mining claim activity does not transform the determination from one within the province of the Forest Service to one within the exclusive province of the Interior Department.

9 & 10. Adjudication of Claims not Before the Court

In addition to expanding upon objections 7 and 8, plaintiffs contend that the magistrate erroneously adjudicated plaintiffs' factual claim regarding the

existence of public roads under RS 2477. Having reviewed plaintiffs' complaint, I agree that plaintiffs did not challenge the validity of the Forest Service's determination that the roads in question were not public highways under RS 2477. Claim five of the amended complaint clearly challenges the Forest Service's authority to make the determination under RS 2477, but does not challenge the decision itself as being "arbitrary or capricious" under the APA, 5 U.S.C. § 706.

A review of the underlying motions leads me to believe that the magistrate was persuaded by defendants' memorandum in support of their motion for summary judgment against the Robert E. and Thunderbolt claims. In their memorandum, defendants argue that a review of the administrative record reveals that there is no proof to support plaintiffs' underlying assertion that the roads in question were

"public highways" under RS 2477. Thus, the government's positions is that, regardless of which agency heard plaintiffs' argument, it was doomed to fail.

Although the government's "back door" argument is both compelling and persuasive, I agree with plaintiffs that the underlying merits of the Forest Service's determination takes us beyond the scope of the issue plaintiffs raise in their complain regarding the authority of the Forest Service to adjudicate the public highway claims. Thus, although I adopted Judge Dale's findings and analysis with respect to the Forest Service's authority to consider the claims, I decline to adopt those portions of his findings which review the specific determinations made by the Forest Service relative to the "public highway" claims under RS 2477.

Plaintiffs also challenge the magistrate's denial of their equitable

estoppel claim on page 25. Having reviewed this claim, I concur in Judge Dale's findings and conclusion and adopt them as my own.

11. Rejection of Plaintiffs' Fifth Amendment "Taking" Claims

Plaintiffs object to the magistrate's finding that plaintiffs cannot establish a "taking" because the validity of their mining rights is in dispute.[4] In their "supplemental objections," plaintiffs point to the Appropriations Act for the Department of the Interior, enacted October 5, 1992. Under the Act, unpatented mining claims must pay an annual "rental fee." Plaintiffs indicate that the Wilson mine claimants have been required to pay this

[4]In their response to plaintiffs' objections, defendants note that, since the arguments before Judge Dale, Judge Sweitzer (an ALJ for the Department of the Interior) found that the Robert E. claims were invalid and that plaintiffs have appealed that decision to the Interior Board of Land Appeals.

fee. Plaintiffs argue that the Act and rental fee recognize, at least inferentially, that plaintiffs have possessory interests of some kind in the claim even during the pendency of a validity determination.

I agree with Judge Dale's conclusion to the extent that I find that a "taking" claim is simply not "ripe" until matters such as validity of the claim itself are finally determined. I also question whether, if the claims ripen, I would have subject matter jurisdiction given the Tucker Act's provision granting exclusive jurisdiction to the Claims Court over claims against the government for more than $10,000. See Fuller, Opinion at p. 30, citing 28 U.S.C. § 1346 and Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1016 (1984).

CONCLUSION

Based on the foregoing and with the few limited exceptions noted supra, I ADOPT

the Findings and Recommendation #85 of Magistrate Dale. Accordingly, defendants' motions for partial summary judgment #36 and #43 are GRANTED; defendants' motion to strike the affidavit of Bronson C. La Moure #78 is DENIED and plaintiffs' motion for summary judgment #51 is DENIED.

IT IS SO ORDERED.

DATED this 22 day of December, 1992.

/s/ Malcolm F. Marsh
Malcolm F. Marsh
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

LEROY CLOUSER and SHARON CLOUSER (Owners of the Robert E. Mining Claims, CARL E. SETERA, JUDITH M. SETERA, ANTHONY S. SETERA and LOIS A. SETERA (Owners of the Thunderbolt Mining Claims), GARY HOEFLER, DON WURSTER CAMERON ANDERSON and ROBIN ANDERSON (Owners of the Wilson Mining Claim), Plaintiffs, v. MIKE ESPY, Secretary of Agriculture, United States of America, DALE ROBERTSON, Chief Forester Forest Service, JOHN BUTRUILLE, Regional Forester, Pacific Northwest Region, JEFF BLACKWOOD, Forest Supervisor, Umatilla National Forest, CRAIG SMITH DIXON, District Ranger, North Fork John Day Ranger District, MIKE LUNN, Forest Supervisor, Siskiyou National Forest, DENNIS HOLTHUS, District Ranger, Illinois Valley Ranger District, BRUCE BABBITT, Secretary of the Interior, CY JAMISON, Director of the Bureau of Land Management, D. DEAN BIBLES, State Director,	CIVIL NO. 91-3-AS

Oregon State Office,)
Defendants.)

This court, by Order dated December 22, 1992, having granted defendants' motions for summary judgment, and having denied plaintiffs' motion for summary judgment, IT IS ORDERED AND ADJUDGED that plaintiffs' complaint and action are DISMISSED with prejudice.

Dated this 28 of January, 1993.

/s/ Malcolm F. Marsh
MALCOLM F. MARSH
UNITED STATES DISTRICT JUDGE

Presented by:

/s/ Thomas C. Lee
THOMAS C. LEE
Assistant United States Attorney
of Atorneys for Defendants

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

LEROY CLOUSER and SHARON CLOUSER (Owners of the Robert E. Mining Claims, CARL E. SETERA, JUDITH M. SETERA, ANTHONY S. SETERA and LOIS A. SETERA (Owners of the Thunder-bolt Mining Claims), GARY HOEFLER, DON WURSTER CAMERON ANDERSON and ROBIN ANDERSON (Owners of the Wilson Mining Claim),	CV 91-3-DA FINDINGS AND RECOMMENDATION
Plaintiffs-Appellants,	
v.	
MIKE ESPY, Secretary of Agriculture, United States of America, DALE ROBERTSON, Chief Forester Forest Service, JOHN BUTRUILLE, Regional Forester, Pacific North-west Region, JEFF BLACK-WOOD, Forest Supervisor, Umatilla National Forest, CRAIG SMITH DIXON, District Ranger, North Fork John Day Ranger District, MIKE LUNN, Forest Supervisor, Siski-you National Forest, DENNIS HOLTHUS, District Ranger, Illinois Valley Ranger District, BRUCE BABBITT, Secretary of the Interior, CY JAMISON,	

Director of the Bureau of)
Land Management, D. DEAN)
BIBLES, State Director,)
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Defendants-Appellees.)

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DALE, Magistrate Judge

Plaintiffs, the owners of various mining claims, bring this action against defendant Clayton Yeutter, Secretary of the Department of Agriculture, and others, seeking a declaration of their right to access and right to conduct operations on certain mining claims. Plaintiffs also seek to enjoin defendants from limiting their

motorized access to the claims and restricting their mining activities.

Defendants move for partial summary judgment (#36) against plaintiffs' third, fourth, and seventh claims for relief, which pertain to the Wilson River Placer mining claim (Wilson claim). Defendants move separately for partial summary judgment (#43) against plaintiff's first, second, fifth, sixth, eighth, ninth, and tenth claims for relief, which pertain to the Robert E. and Thunderbolt mining claims. Defendants also move to strike the affidavit of Bronson C. La Moure (#78) from plaintiffs' summary judgment papers. Plaintiffs move for summary judgment (#51) on all claims. I recommend granting defendants' motions and denying plaintiffs' motion.

BACKGROUND

I. The Wilson Claim.

Plaintiffs Gary Hoefler, Don Wurster, Cameron Anderson, and Robin Anderson own the Wilson claim. The claim is located along the Illinois river in Josephine County, Oregon. It is part of the Siskiyou National Forest and the Illinois River component of the Wild and Scenic Rivers System. The United States Forest Service (Forest Service) disputes the validity of the claim. The Forest Service has submitted that issue to the Bureau of Land Management (BLM) for determination.

In 1988, plaintiff Hoefler submitted a plan for proposed operations in 1989 in accordance with 36 C.F.R. § 228.4. The District Ranger, observing that the validity of the claim was at issue, did not approve the plan of operations. Plaintiff did not appeal that decision.

On march 29, 1990, plaintiffs submitted a notice of intent to conduct mining

operations on the Wilson claim in 1990. On April 4, 1990, the District Ranger responded that the Forest Service would not act on the notice until (i) the BLM decided the validity of the claim, and (ii) it was demonstrated that a valuable mineral deposit existed on the claim. Plaintiffs appealed the District Ranger's response pursuant to 36 C.F.R. part 217.

On June 6, 1990, the BLM issued its decision that the Wilson claim was void ab initio because it was filed on land that had been withdrawn from the mineral entry. Plaintiffs appealed the decision to the Interior Board of Land Appeals (IBLA). That appeal is still pending. The Forest Supervisor, upon learning of the BLM's decision, notified plaintiffs that their appeal of the District Ranger's April 4, 1990, response was moot. Plaintiffs appealed the Forest Supervisor's decision

to the Deputy Regicnal Forester and additionally requested that it be stayed. The Deputy Regional Forester rejected the appeal on the grounds that decisions made pursuant to 36 C.F.R. § 228.4(a) are not appealable and, therefore, the Forest Supervisor should not have accepted an appeal of the District Ranger's April 4, 1990, decision.

On October 4, 1990, plaintiffs submitted additional information to the District Ranger and requested a determination as to whether a plan of operations would be required in order to commence mining operations on the Wilson claim. In an October 31, 1990 decision, the District Ranger found that a plan of operations was required because the proposed mining activity would probably cause a significant disturbance of surface resources. The District Ranger also indicated that he did

not have authority to approve significant surface disturbing mining activity on a mining claim declared void. Nevertheless, he permitted plaintiffs to proceed with annual assessment work on the claim because such activity would not significantly disturb surface resources. Plaintiffs have not submitted a plan of operations in accordance with the District Ranger's October 31, 1990 decision.

II. The Robert E. claim.

The Robert E. claim is owned by plaintiffs Leroy Clouser and Sharon Clouser. The claim is located in Curry County, Oregon, and is part of the Siskiyou National Forest. The land on which the claim is located was withdrawn from the public domain for inclusion in the Siskiyou Forest Reserve on October 5, 1906. the land became pat of the Kalmiopsis Wilderness on September 3, 1964. The

Robert E. claim is unpatented.

Plaintiffs claim that the Robert E. claim can be reached by two old roads over national forest and wilderness area lands. They maintain that the public has operated motor vehicles on the roads for over 50 years. In addition, plaintiffs contend that they have conducted mining activities on the Robert E. claim for 20 years.

In 1985 the Forest Service initiated contest proceedings to declare the Robert E. claim void on the round that no valuable mineral deposits had been discovered as of 1964, when the claim was included in the Kalmiopsis Wilderness. A hearing in the contest proceedings was conducted in December 1990, and the matter is now pending before a Department of the Interior (Interior Department) administrative law judge.

In June 1990, plaintiffs filed a plan of

operations for mining activities to be conducted on the Robert E. claim in that year. The plan included a proposal for motorized access to the claim. The Forest Supervisor approved the plan on certain conditions, including the denial of motorized access. Plaintiffs appealed that decision.

On October 2, 1990, the Deputy Regional Forester affirmed the decision of the Forest Supervisor. Concerning the use of the motorized equipment on the roads, the Deputy Regional Forester determined that:

> [t]he creation of the Siskiyou National Forest in 1906 predates any roads to the mining claims. The road to the mining claims is a Forest Service road, not a public highway. As such it is subject to Forest Service regulation.

The decision denying motorized access was also based on the fact that the Forest Service's challenge to the validity of the claim had not been resolved by the Interior Department.

III. The Thunderbolt claim.

The Thunderbolt claim is owned by plaintiffs Carl Setera, Judith Setera, and Anthony Setera. The claim is located in Oregon in the Umatilla National Forest. The land on which the claim is located was withdrawn from the public domain on March 15, 1906, when it became part of the Blue Mountain Forest Reserve. The land became part of the North Fork John Day Wilderness on June 26, 1984. The Thunderbolt claim is subdivided into Nos. 1, 2, 4, 5, 6 and 7. The claim was located in 1980, excepting Thunderbolt No. 7, which was located in 1982. The Thunderbolt claim is unpatented.

In 1987, the Forest Service evaluated Thunderbolt No. 2, and in January 1988, validated a mineral discovery on the claim. In 1988, plaintiffs filed a notice of intent and plan of operations proposing the

us of a suction dredge and other equipment to test each of the Thunderbolt claims. In connection with the plan of operations, plaintiffs mapped out a proposed access route over Tout Creek Trail 3028 an North Fork Trail 3034, a distance of approximately four miles. The proposal also included use of a power winch to clear the trails.

In November 1988, the Forest Supervisor issued a decision on the plan of operations that restricted plaintiffs to non-motorized access to the claim. Plaintiffs appealed that decision. In his February 1989 response to the appeal, the Forest Supervisor found that (i) motorized access was not essential due to the limited scope of the mining operation, (ii) the main access road had been gated and abandoned as a Forest Service road in 1984, and (iii) no motorized use of the road had been

permitted by the Forest Service since that time.

In May 1989, plaintiffs filed a plan of operations proposing, among other things, rehabilitation of the access road with motorized equipment. In July 1989, they filed a revised plan of operations. The revised plan, although scaling back proposed activity on the claim for 1989, still called for motorized access over Trout Creek Trail 3028 and North Fork Trail 3034.

Plaintiffs' revised plan of operations was rejected by the Forest Supervisor in August 1989. Plaintiffs appealed and, in February 1990, the Deputy Regional Forester affirmed the decision of the Forest Supervisor on the rounds that (i) plaintiffs' road-clearing activities would likely cause a significant disturbance of surface resources, and (ii) the Forest Service

customarily denied motorized access to mining operations of the kind proposed by plaintiffs. Plaintiffs requested but were unable to obtain further administrative review of the Deputy Regional Forester's decision.

LEGAL STANDARD

Federal Rule of Civil Procedure 56(c) authorizes summary judgment if no genuine issue exists regarding any material fact and the moving party is entitled to judgment as a matter of law. The moving party must show an absence of an issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Once the moving party shows the absence of an issue of material fact, the nonmoving party must go beyond the pleadings and designate specific facts showing a genuine issue for trial. Celotex, 477 U.S. at 324.

The substantive law governing a claim or

defense determines whether a fact is material. T.W. Elec., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). Reasonable doubts about the existence of a factual issue should be resolved against the moving party. T.W. Elec. Serv., 809 F.2d at 631. The court must view the inferences drawn from the facts in the light most favorable to the nonmoving party. T.W. Elec. Serv., 809 F.2d at 630-31.

DISCUSSION

I. The La Moure affidavit.

Plaintiffs submit the affidavit of Bronson C. La Moure in opposition to defendants' motions for partial summary judgment and in support of their own summary judgment motion. Defendants move to strike the affidavit on the ground that it is not part of the administrative record and, therefore, it contains matters beyond

the scope of review under the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-559, §§ 701-706.

My review of agency action must be confined to the administrative record. 5 U.S.C. § 706; Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985). Here, the Forest Service did not consider the La Moure affidavit when it took action on plaintiffs' mining claims. Further, no special circumstances warrant supplementation of the agency record. Animal Defense Council v. Hodel, 840 F.2d 1432 (9th Cir. 1988), corrected, 867 F.2d 1244 (1989). Therefore, the La Moure affidavit should be stricken from the record on summary judgment.

II. The Wilson claim.

Plaintiffs, for their third, fourth, and seventh claims for relief, challenge the authority of the Forest Service to

interfere with mining operations on the Wilson claim. They contend that (i) the Forest Service has no authority to stop mining activities on a pre-existing mining claim based on the pendency of proceedings to determine the claim's validity (third claim for relief), (ii) Interior Department regulations prohibit the Forest Service from "giving effect to decisions and actions pending in Department of Interior contest and appeal proceedings ..." (fourth claim for relief), and (iii) the Forest Service is barred from challenging the validity of a mining claim based on lack of mineral deposits once it has already failed to invalidate the claim based on title deficiencies (seventh claim for relief). Defendants correctly observe that these claims for relief pertain only to the Wilson claim.

Defendants contend that plaintiffs have

not exhausted administrative remedies available under 36 C.F.R., part 228 and, therefore, this court should not consider plaintiffs' allegations concerning the Wilson claim. I agree.

A. Determinations regarding the use of Forest Service lands are subject to administrative review.

Before commencing mining operations which might disturb surface resources on national forest lands, an operator must submit a notice of intent to operate to the District Ranger having jurisdiction over the operation site. 36 C.F.R. § 228.4(a). If the District Ranger finds that the proposed activity "will likely cause a significant disturbance of surface resources, the operator shall submit a proposed plan of operations to the District Ranger." Id.; United States v. Brunskill, 792 F.2d 938, 940 (9th Cir. 1986) (mining

activity likely to cause significant surface disturbance of surface resources cannot be carried on without an approved operating plan).

A District Ranger's decision requiring that an operator submit a plan of operations is not appealable. Under 36 C.F.R. §§ 251.82(a)(1)-(12), "appeal decisions" include only written decisions 'relat[ing] to issuance, denial, or administration of ... written instruments to occupy and use National Forest System lands...." The specific written instruments enumerated in the regulation are all either plans of operations, permits, special use authorizations, or decisions relating to private land within a specific national recreation area. Decisions regarding notices of intent are not classified as appealable written decisions under the regulations.

A decision pertaining to a plan of operations, in contrast, is appealable. A plan of operations is subject to approval by the District Ranger. 36 C.F.R. § 228.4(b). An operator dissatisfied with the conditions of a plan established by the District Ranger may request review by the Forest Supervisor under 36 C.F.R. §§ 228.14 and 251.87(c). the Forest Supervisor's decision is subject to further review by the Regional Forester, whose decision on a second-level appeal constitutes a final administrative determination. 36 C.F.R. part 251.87(e)(3). review of the regional Forester's decision is available under the APA. United States v. Doremus, 888 F.2d 630, 632-33 (9th Cir. 1989), cert denied, 111 S.Ct. 751 (1991).

B. Plaintiffs have not exhausted their administrative remedies.

The exhaustion doctrine provides that

"no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." McKart v. United States, 395 U.S. 185, 193 (1969) (citation omitted). In the absence of a statutory mandate, the Ninth Circuit applies "a prudential exhaustion requirement...." Es Rescate Legal Serv., Inc. v. Executive Office of Immigation Review, 959 F.2d 742, 747 (9th Cir. 1992). The requirement that administrative remedies be exhausted (1) permits the agency to generate a proper record and reach a proper decision, (ii) discourages litigants rom deliberately circumventing the administrative scheme, and (iii) provides the agency with the opportunity to correct its own mistakes, thereby obviating the need for judicial review. Id.

Defendants maintain that plaintiffs have

failed to exhaust administrative remedies in connection with the Forest Service's handling of their 1988 plan of operations and 1989 notice of intent. I agree.

1. Plaintiffs' 1988 plan of operations.

In 1988, plaintiffs submitted a plan of operations outlining proposed mining activities on the Wilson claim for 1989. the District Ranger did not approve the plan. Plaintiffs contend that the rejection of the plan constitutes a final agency determination which is subject to judicial review. I disagree.

The denial of a plan of operations is subject to review. See 36 C.F.R. §§ 251.87(c) and (e)(3). Plaintiffs did not file an appeal. Plaintiffs have not exhausted their administrative remedies in connection with the denial of the 1988 plan of operations. Accordingly, plaintiffs' objections to the Forest Service's handling

of the 1988 plans are not before this court. See Brunskill, 792 F.2d at 941 (refusing to consider merits of operating plan where defendants did not appeal rejection of proposed plan).

2. Plaintiffs' 1989 notice of intent.

Plaintiffs maintain that the District Ranger improperly handled the March 29, 1990, notice of intent by (i) determining on April 4, 1990, that it would be inappropriate to take action on the notice while the validity of the Wilson claim was being examined by the BLM, and (ii) determining on October 31, 1990, that plaintiffs would have to submit a plan of operations addressing the impact of their proposed activities on surface resources. Whether those criticisms are justified is not a question to be decided by this court. As I have already stated, a District Ranger's decision regarding the disposition

of a notice of intent is not an appealable decision under the regulations. 36 C.F.R. §§ 251.82(a)(1)-(12). Therefore, neither of the District Ranger's 1990 decisions constitutes a final, appealable agency determination.

It does not follow, however, that there were no administrative avenues of relief available to plaintiffs. Had plaintiffs elected to take further action, they could have submitted a plan of operations as requested by the District Ranger and appealed any decision on the plan. See 36 C.F.R. §§ 251.87(c) and (e)(3). they did not do so. Consequently, the Forest Service has had no opportunity to issue a final, appealable decision regarding the Wilson claim.

C. There is no basis for waiver of the exhaustion requirement.

Plaintiffs assert in conclusory fashion

that administrative review would be futile or would result in a deprivation of existing rights. However, plaintiffs present no compelling evidence to establish the futility of the administrative appeal process. I am satisfied, therefore, that waiver of the exhaustion requirement is not warranted.

Under the circumstances, further consideration by this court of plaintiffs' allegations concerning the Wilson claim would be improper. Plaintiffs' claims pertain to matters within the special competence of the Forest Service and for which there are available, as yet untested, administrative avenues of relief. Accordingly, I find that plaintiffs have not exhausted their administrative remedies as to the Wilson claim. I recommend that defendants' motion for partial summary judgment against plaintiffs' third, fourth,

and seventh claims of relief (#36) be granted, and that plaintiffs' motion for summary judgment (#51) be denied to the extent it concerns the Wilson claim.

III. The Robert E. and Thunderbolt claims

Plaintiffs, for their remaining claims for relief, assert a right to motorized access to both the Robert E. and Thunderbolt mining claims. They contend that (i) the Interior Department alone has authority to determine the possessory rights of claim owners and, therefore, the actions of the Forest Service constitute a violation of due process and a taking of property under the Fifth Amendment (first, fifth, ninth, and tenth claims for relief), (ii) the Forest Service has no authority to restrict access to mining claims on pre-existing roads based on the pendency of administrative proceedings to determine the validity of the claims (second claim for relief),

(iii) the "access" provisions of the Wilderness Act, 16 U.S.C. § 1134(b), do not apply to mining claims located within a wilderness area, but which pre-date the creation of the wilderness area (sixth claim for relief), and (iv) a valid unpatented mining claim which existed prior to inclusion in a wilderness area must be treated as if it were patented (eighth claim for relief).

Defendants maintain that the Forest Service was empowered to restrict motorized access to both the Robert E. and Thunderbolt claims. Defendants are correct.

A. The Forest Service is authorized to control access to national forest lands.

Plaintiffs argue that the Forest Service has no authority to regulate their means of accessing their claims. Distilled to its essentials, their position is that the Interior Department, pursuant to 36 C.F.R.

§ 228.1, has exclusive jurisdiction to resolve disputes regarding the method of access to mining claims. I disagree with plaintiffs' interpretation of the applicable law.

Pursuant to the Organic Administration Act of 1897, which established the national forest system, the Secretary of Agriculture (the Secretary) is authorized to make rules and regulations to protect national forest lands from destruction and depredation. 16 U.S.C. § 551. Persons entering the national forests for the purpose of exploiting mineral resources "must comply with the rules and regulations covering such national forest." 16 U.S.C § 478. Mining operations are not exempt from the Secretary's rule-making authority. United States v. Weiss, 642 F.2d 296, 298 (9th Cir. 1981). The Ninth Circuit has established that the authority of the

Secretary includes the right to restrict motorized access to specified areas of the national forests. McMichael v. United States, 355 F.2d 283 (9th Cir. 1965) (upholding regulation prohibiting use of motorized vehicles i portion of national forest). Finally, I observe that, under 16 U.S.C. § 1134(b), the Secretary may permit access to mining claims on national forest wilderness area "by means which have been or are being customarily enjoyed with respect to other such areas similarly situated."

The backbone of plaintiffs' argument is that 36 C.F.R. § 228.1 gives the Interior Department exclusive jurisdiction to resolve disputes over access to mining claims. Plaintiffs' reading of the regulation is incorrect. 36 C.F.R. § 228.1 provides:

> It is the purpose of these regulations to set forth rules and

> procedures through which use of the surface of National Forest System lands in connection with operations authorized by the United States mining laws (30 U.S.C. 21-54), which confer a statutory right to enter upon the public lands to search for minerals, shall be conducted so as to minimize adverse environmental impacts on National Forest System surface resources. It is not the purpose of these regulations to provide for the management of mineral resources; the responsibility for managing such resources is in the Secretary of the Interior.

This provision is nothing more than a general policy statement which describes, in broad strokes, the allocation of responsibility between the Department of Agriculture and the Interior Department in the regulation of national forest surface resources. There is nothing about 36 C.F.R. § 228.1 which suggests that it was intended to address methods of access to mining claims on national forest lands. Therefore, the language of the regulation provides no basis for exclusive Interior Department jurisdiction over access

disputes.

I also reject plaintiffs' argument that the internal procedures of the Forest Service require that access disputes be resolved by the Interior Department. Plaintiffs rely on section 2813.14 of the Forest Service's internal policy manual which provides:

> Right of Access to Claim. The right of reasonable access for purposes of prospecting, locating, and mining is provided by statute. Such access must be in accordance with the rules and regulations of the Forest Service. However, the rules and regulations may not be applied so as to prevent lawful mineral activities or to cause undue hardship on bona fide prospectors and miners.

Nothing in this policy statement grants the Interior Department exclusive jurisdiction to determine rights of access to mining claims. Moreover, even if section 2813.14 could reasonably be construed in the manner argued by plaintiffs, it would not improve their position. "[T]he Forest Service Manual merely establishes guidelines for

the exercise of the Service's prosecutorial discretion; it does not act as a binding limitation on the Service's authority." Doremus, 888 F.2d at 633 n.3.

I am also unswayed by plaintiffs' assertions that the Forest Service acted in violation of 30 U.S.C. § 612(b). The Forest Service has the right, under that provision, to manage and dispose of vegetative surface resources on claims, as well as the right to manage other surface resources on claims, provided that its use of the surface does not "endanger or materially interfere with ... mining ... operations or uses reasonably incident thereto...." Arguing that the denial of motorized access to claims constitutes material interference with mining operations, plaintiffs conclude that the Forest Service has over-stepped its grant of regulatory authority.

That the Forest Service has restricted plaintiffs to access by non-motorized means does not, without more, establish material interference with mining operations in violation of 30 U.S.C. § 612. As a general matter, the Forest Service may regulate the use of surface resources so long as mining activities are not "prohibited nor so unreasonably circumscribed so as to amount to a prohibition...." Weiss, 642 F.2d at 299. Further, pursuant to 36 C.F.R. § 228.15(b), "the use of mechanized transport ... or motorized equipment" need not be permitted unless essential to mining activities.

Defendants assert that motorized access is not essential because the presence of valuable mineral deposits on the Robert E. claim is questionable and the minimal production from the Thunderbolt claims can be accommodated by pack animal. Plaintiffs

have not responded to these allegations. Instead, they allege by affidavit that they have sustained losses of $80,000 on the Robert E. claim and $60,000 on the Thunderbolt claim. Plaintiffs' estimate of damages is of little value absent evidence that the Robert E. claim contains valuable mineral deposits, or that plaintiffs would have sustained a significant loss on the Thunderbolt claim even if they had conducted their mining activities without motor vehicles. Moreover, even assuming that plaintiffs have incurred some financial loss, such evidence would neither establish that motorized access is essential under 36 C.F.R. § 228.15(b), nor that plaintiffs' operations have been effectively prohibited. Therefore, I am satisfied that the Forest Service's refusal to allow motorized access was, in this instance, a reasonable exercise of its

power to regulate the use of national forest surface resources under 30 U.S.C. § 612.

Two remaining arguments require comment. Plaintiffs contend that the Interior Department, in its answers to plaintiffs' requests for admission, has acknowledged that it has exclusive jurisdiction over access disputes. I am not persuaded that the Interior Department's stance on this issuance has any relevance. In any event, the discovery responses relied on by plaintiffs provide no indication that the Interior Department has adopted the position ascribed to it by plaintiffs.

Plaintiffs also refer to United States mining laws, 30 U.S.C. §§ 21-54, apparently for the proposition that the Interior Department's role in the regulation of mining operations will be undermined if the Forest Service is permitted to regulate

access to mining claims. The interests served by mining laws and those served by the national forest system "were intended to and can coexist." Weiss, 642 F.2d at 299. The mining laws do not, therefore, diminish the authority of the Secretary to adopt reasonable rules an regulations for the protection of the national forests. Id.

B. The Forest Service acted within its authority.

Having determined that the Forest Service is empowered to regulate ingress and egress over national forest lands, my next task is to determine whether the Forest Service exercised that authority in an appropriate manner. I conclude that it did.

As I have already observed, 16 U.S.C. § 1134(b) authorizes the Secretary to permit access to mining claims on national forest

wilderness areas "by means which have been or are being customarily enjoyed with respect to other such areas similarly situated." Further, 36 C.F.R. § 228.15(c) provides, in part:

> Persons with valid mining claims wholly within National Forest Wilderness shall be permitted access to such surrounded claims by means consistent with the preservation of National Forest Wilderness which have been or are being customarily used with respect to other such claims surrounded by National Forest Wilderness.

I agree with defendants that these statutory and regulatory provisions, taken together, require the Forest Service to grant motorized access to mining claims only if (i) the claim is valid, and (ii) motorized vehicles are customarily used to access similarly situated claims.

1. The denial of motorized access to the Robert E. claim was not improper.

a. Plaintiffs have no right to engage in mining activities on claims void

of valuable mineral deposits.

The validity of the Robert E. claim is presently disputed by the parties and the issue is pending before the Interior Department. Notwithstanding the controversy over the claim's validity, plaintiffs argue that the claim should be treated as valid for purposes of determining their access rights. There is no legal basis to support such a fiction.

The Deputy Regional Forester denied plaintiffs' request for motorized access to the Robert E. claim because the validity of the claim had not ben resolved by the Interior Department. The policies applied by the Forest Service in this instance were entirely consistent with the objectives of the mining program. The mining laws are designed to make "public lands available to people for the purpose of mining valuable mineral deposits and not for other

purposes." United States v. Coleman, 390 U.S. 599, 602 (1968); see also 30 U.S.C. § 22. Forest Service policies reflect that objective. The Forest Service Manual, at section 2815.11(2), requires certification of valuable mineral deposits before approval of mining activities on lands designated as wilderness. The mining laws also charge the Secretary of the Interior with the responsibility of recognizing valid claims and eliminating invalid claims. Cameron v. United States, 252 U.S. 450, 460 (1920). Here, as soon as the Forest Service had cause to question the validity of the Robert E. claim, it initiated appropriate proceedings before the Department of the Interior. Accordingly, there was nothing objectionable about the Forest Service's handling of the plaintiffs' 1990 plan of operations for the Robert E. claim.

Indeed, given the dispute over the existence of valuable mineral deposits on the claim, it was within the power of the Forest Service to reject the plan of operations in its entirety, rather than approve it on the condition of non-motorized access.

Plaintiffs, relying on 43 C.F.R. § 4.21(a), argue that the validity of their claim is not affected by the pendency of proceedings before the Interior Department. That regulation states, in pertinent part:

> Except as otherwise provided by law or other pertinent regulation, a decision will not be effective during the time in which a person adversely affected may file a notice of appeal, and the timely filing of such a notice of appeal will suspend the effect of the decision appealed from pending the decision on appeal.

Plaintiffs have misconstrued the meaning of this regulation. Section 4.21 sets forth general rules concerning the appeals process within the Interior Department.

Plaintiffs present no authority to establish that, under § 4.21(a), the effect of a decision of the Department of Agriculture is stayed by the initiation of contest proceedings before the Interior Department. In the absence of decisional or statutory law, I cannot interpret a government regulation in a manner inconsistent with its stated objective. For this same reason, I also reject plaintiffs' contention that the Forest Service was required under § 4.21(a) to approve their entire 1990 plan of operations pending the outcome of the contest proceedings.

Finally, I do not accept plaintiffs' argument that the Forest Service's handling of their 1990 plan of operations was arbitrary and capricious. I am satisfied that, under the statutes and regulations already discussed, the Forest Service had a

duty to ascertain the validity of the Robert E. claim before granting plaintiffs the right of motorized access. I remind plaintiffs that, although certain possessory rights arise from a valid mining claim, "no right arises from an invalid claim of any kind." Best v. Humboldt Placer Mining Co., 371 U.S. 334, 337 (1963) (quoting Cameron, 252 U.S. at 459-60). The Forest Service's decision to approve the plan of operations, subject to the condition of non-motorized access, was therefore appropriate. See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) (agency action not arbitrary and capricious if based on relevant factors and there was no clear error of judgment).

b. The roads to the Robert E. claim are subject to Forest Service regulation.

Although the parties agree that the

Forest Service prohibited motorized access based on the pendency of Interior Department contest proceedings, the Deputy Regional Forester's decision of October 2, 1990, stated an alternative justification for the decision. The Deputy Regional Forester found that:

> [t]he creation of the Siskiyou National Forest in 1906 predates any roads to the mining claims. The road to the mining claims is a Forest Service road, not a public highway. As such it is subject to Forest Service regulation.

I agree that the two roads to the Robert E. claim are subject to Forest Service regulation. Further, I find that the Forest Service's control over the roads provided it with an alternative, independent basis for denying plaintiffs' request for motorized access.

Under the Lode Law of 1866, R.S. 2477 (43 U.S.C. § 932), which was repealed in 1976, the public may acquire a right of way for the construction of highways over lands

not reserved for public use, subject to the requirements of stat law. Sierra Club v. Lujan, 949 F.2d 362, 265 (sic) (10th Cir. 1991) (citing Sierra Club v. Hodel, 848 F.2d 1068 (10th Cir. 1988)). Oregon has recognized that public use of a roadway, "while the land is in the public domain," is sufficient to create a right of way over public land. Montgomery v. Somers, 50 Or. 259, 266 (1907). Pursuant to 43 U.S.C. § 1769(a), all rights of way existing at the time of the R.S. 2477's repeal have been expressly preserved. The question, therefore, is whether the trails to the claim were in use by the public before the land on which they are located was withdrawn from the public domain.

The land on which the Robert E. claim is located was withdrawn from the public domain for inclusion in the Siskiyou Forest Reserve on October 5, 1906. Although

plaintiffs allege in their complaint that the roads have been used by the public for over 50 years, they have presented no specific evidence, by affidavit or otherwise, to establish that the roads were in public use in 1906. Fed. R. Civ. P. 56(e). I cannot accept plaintiffs' conclusory allegation that the roads are old enough to create a public easement. This is particularly true in light of the uncontroverted evidence submitted by the Forest Service that no old roads to the claim are reflected in Forest Service records. (Declaration of Reb Bennett--Robert E.) Therefore, plaintiffs have not established the existence of a public right of way to the Robert E. claim.

I reject plaintiffs' argument that, because the Forest Service failed to require a permit for use of the Robert E. roads, it is equitably estopped rom denying

that the roads are public highways under R.S. 2477. A claim based on equitable estoppel was not pleaded in plaintiffs' amended complaint, nor have plaintiffs established an appropriate basis for an estoppel. As stated by the Ninth Circuit in Weiss:

> The failure of an executive agency to act does not forfeit governmental property or rights. In this situation, a mining claimant may not claim any sot of prescriptive right which would prevent the government from protecting its superior vested property rights.

Weiss, 642 F.2d at 299 (citations omitted). Accordingly, the Forest Service is not estopped from asserting its control over roads to the Robert E. claim.

Plaintiffs next argue that the Forest Service had no authority to disallow use of the roads under R.S. 2477. Only the Interior Department, they argue, has jurisdiction to determine whether a road has become a public right of way under the

statute. Plaintiffs cite no statute or regulation to support their argument. Instead, they rely on the Interior Department's response to a request for admission. The discovery response, however, is both inconclusive and of questionable relevance. Plaintiffs' argument is without merit.

Plaintiffs' final argument regarding the Robert E. claim is that the Forest Service cannot enforce a ban on the use of motor vehicles by amending or denying a plan of operations. In support, plaintiffs rely on 36 C.F.R. § 228.4(a)(1), which provides:

> The requirements to submit a plan of operations shall not apply; (i) To operations which will be limited to the use of vehicles on existing public roads or roads used and maintained for National Forest purposes.

Plaintiffs' proposed operations on the Robert E. claim were not limited to the use of motor vehicles on existing roads, but included numerous other types of mining

activity. Plaintiffs' reliance on 36 C.F.R. § 228.4(a)(1) is therefore misplaced.

2. The denial of motorized access to the Thunderbolt claim was not improper.

Plaintiffs argue that the Forest Service had no authority to prohibit motorized access to the Thunderbolt claim over Trout Creek rail 3028 and North Fork Trail 3034. They contend that the trails must be treated as public roads under R.S. 2477. I disagree.

To establish a public right of way to the Thunderbolt claim, plaintiffs must show that the trails to the claim were in use by the public before March 15, 1906, the date on which the land was withdrawn from the public domain for inclusion in the Blue Mountain Forest Reserve. Plaintiffs rely generally on historic maps and publications, including a 1901 publication titled

"The Gold Belt of the Blue Mountains of Oregon." However, none of these materials establishes that the trails were in public use before 1906. Defendants assert that no old roads to the claim are documented in Forest Service records (Declaration of Reb Bennett--Thunderbolt), and my review of the administrative record has led me to conclude that defendants are correct. Under the circumstances, plaintiffs' conclusory allegation that the trails are old enough to create a public right of way is not sufficient to defeat summary judgment. Fed. R. Civ. P. 56(e).

In the alternative, plaintiffs again argue that (i) the Forest Service has no jurisdiction to determine whether a public easement exists under R.S. 2477, and (ii) the Forest Service cannot enforce a ban on the use of motor vehicles by amending or denying a plan of operations. In my

discussion of the Robert E. claim, I concluded that those arguments lack merit. I reject them now for the same reasons.

The final question I must address is whether the Forest Service acted within its authority when it found that motor vehicles were not customarily used on Trout Creek Trail 3028 and North Fork Trail 3034. Plaintiffs contend that the Forest Service's interpretation of the "customary use" standard was arbitrary and amounted to a material change in existing law which was not adopted in accordance with applicable procedural rules. I disagree.

I have already determined that the Forest Service may deny motorized access to a mining claim if motorized vehicles are not customarily used to access similarly situated claims. 16 U.S.C. § 1134(b); 36 C.F.R. § 228.15(c). Here, the evidence establishes that the access route proposed

by plaintiffs has been blocked by a gate and closed to traffic as of 1984. The administrative record reveals that the trails are no longer maintained by the Forest Service and are returning to a natural condition. The trails, in their present condition, are not suitable for motorized access. In addition, plaintiffs have presented no evidence that the Forest Service has permitted motorized access to other, similarly situated claims. Under the circumstances, plaintiffs cannot establish customary use of motorized vehicles over the access route. I am satisfied that the Forest Service applied the "customary use" standard in a reasonable manner.

C. Plaintiffs have not established a taking in violation of the Fifth Amendment

Plaintiffs assert that the Forest Service's decision denying them motorized

access to their mining claims constitutes a unconstitutional taking of property. The argument is without merit.

Regarding the Robert E. claim, the existence of valuable mineral deposits on the claim is at present an open question. As I have stated, no possessory rights arise from an invalid mining claim. Best, 371 U.S. at 337. As for the Thunderbolt claim, plaintiffs have not challenged defendants' position that the modest production from the claim does not justify motorized access, nor have they established that the Forest Service's access restrictions are improper. For this reason, I cannot conclude that plaintiffs' possessory rights under the mining laws have been significantly impaired. Plaintiffs have not established a violation of the Fifth Amendment.

CONCLUSION

Defendants' motion to strike the affidavit of Bronson C. La Moure (#78) should be granted. Defendants' motion for partial summary judgment (#46) and motion for partial summary judgment (#43) should be granted. Plaintiffs' motion for summary judgment (#51) should be denied.

DATED this 10th day of September, 1992.

/s/ William M. Dale
William M. Dale
United States Magistrate Judge

APPENDIX D

Constitutional Provisions

Fifth Amendment

No person shall be **** **** deprived of life, liberty, or property, without due process of law; no shall private property be taken for public use, without just compensation.

Statutory Provisions. (U.S.C. 1988 ed.)

5 U.S.C. § 554 Adjudication

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved -

****

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision

required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public

proceedings. This subsection does not apply

****

16 U.S.C. § 1131

(a) Establishment; Congressional declaration of policy; wilderness areas; administration for public use and enjoyment, protection, preservation, and gathering and dissemination of information; provisions for designation as wilderness areas.

In order to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States and its possessions, leaving no lands designated for preservation, and the protection in their natural condition, it is hereby declared to be the policy of the Congress to secure for the American people of present and future generations

the benefits of an enduring resource of wilderness. For this purpose there is hereby established a National Wilderness Preservation System to be composed of federally owned areas designated by Congress as "wilderness areas", and these shall be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas, the preservation of their wilderness character and for the gathering and dissemination of information regarding their use and enjoyment as wilderness; and no Federal lands shall be designated as "wilderness areas" except as provided for in this chapter or by a subsequent Act.

****

16 U.S.C. § 1133(d) Special provisions

The following special provisions are hereby made:

**** (3) Mining and mineral leasing laws; leases, permits, and licenses; withdrawal of minerals from appropriation and disposition

Notwithstanding any other provisions of this chapter, until midnight December 31, 1983, the United States mining laws and all laws pertaining to mineral leasing shall, to the same extent as applicable prior to September 3, 1964, extend to those national forest lands designated by this chapter as "wilderness areas"; subject, however, to such reasonable regulations governing ingress and egress as may be prescribed by the Secretary of Agriculture consistent with the use of the land for mineral location and development and exploration, drilling, and production, and

use of land for transmission lines, waterlines, telephone lines, or facilities necessary in exploring, drilling, producing, mining, and processing operations, including where essential the use of mechanized ground or air equipment and restoration as near as practicable of the surface of the land disturbed in performing, prospecting, location, and, in oil and gas leasing, discovery work, exploration, drilling, and production, as soon as they have served their purpose. Mining locations lying within the boundaries of said wilderness areas shall be held and used solely for mining or processing operations and uses reasonably incident thereto; and hereafter, subject to valid existing rights, all patents issued under the United States

****

16 U.S.C. § 1271 Congressional declaration of policy

It is hereby declared to be the policy of the United States that certain selected rivers of the Nation which with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values, shall be preserved in free-flowing condition, and that they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations. The Congress declares that the established national policy of dam and other construction at appropriate sections of the rivers of the United States needs to be complemented by a policy that would preserve other selected rivers or sections thereof in their free-flowing conditions to protect the water quality of such rivers

and to fulfill other vital national conservation purposes.

16 U.S.C. Chapter 36-Forest and Rangeland Renewable Resource Planning

§ 1600 Congressional findings

The Congress finds that-

(1) the management of the Nation's renewable resources is highly complex and the uses, demand for, and supply of the various resources are subject to change over time;

(2) the public interest is served by the Forest Service, Department of Agriculture, in cooperation with other agencies, assessing the Nation's renewable resources, and developing and preparing a national resource program, which is periodically reviewed and updated:****

30 U.S.C. § 22 Lands open to purchase by citizens

Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

30 U.S.C. § 26 Locators' rights of possession and enjoyment

The locators of all mining locations made on any mineral vein, lode, or ledge, situated on public domain, their heirs and assigns, where no adverse claim existed on the 10th day of May 1872 so long as they

comply with the laws of the United States, and with the State territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations ****

30 U.S.C. § 28f Hardrock mining claim maintenance fee

(a) Claim maintenance fee

The holder of each unpatented mining claim, mill or tunnel site located pursuant to the Mining Laws of the United States, whether located before or after the enactment of this Act, shall pay to the Secretary of the Interior, on or before August 31 of each year, for years 1994 through 1998, a claim maintenance fee of $100 per claim. Such claim maintenance fee

shall be in lieu of assessment work requirement contained in the Mining Law of 1872 (30 U.S.C. 228-28e) and the related filing requirements contained in section 1744(a) and (c) of Title 43. (Pub. L. 103-66, approved Aug. 10, 1993.)

30 U.S.C. § 621(b) Placer claims; notice; hearing; order, rules and regulations

The locator of a placer claim under this chapter, however,shall conduct no mining operations for a period of sixty days after the filing of a notice of location pursuant to section 623 of this title. If the Secretary of the interior, within sixty days from the filing of the notice of location, notifies the locator by registered mail or certified mail whether placer mining operations would substantially interfere with other uses of the land included within the placer claim, mining operations on that shall be further

suspended until the Secretary has held the hearing and has issued an appropriate order. The order issued by the Secretary of the Interior shall provide for one of the following: (1) a complete prohibition of placer mining: (2) a permission to engage in placer mining upon the condition that the locator shall, following placer operations, restore the surface of the claim to the condition in which it was immediately prior to those operations: or (3) a general permission to engage in placer mining. No order by the Secretary with respect to such operations shall be valid unless a certified copy is filed in the same State or county office in which the locator's notice of location has been filed in compliance with the United States mining laws.

43 U.S.C. § 932 (R.S. 2477) (1970 Ed.)

§932 Right-of-way highways.

The right of way for the construction of highways over public lands, not reserved for public uses, is granted. (R.S. 2477.) Repealed. Pub. L. 94-579, Title VII § 706(a). Oct. 21, 1976, 90 Stat. 2793 with savings provision:

Repeal by Pub. L. 94-579 not to be construed as terminating any valid lease, permit, patent, etc. existing on Oct. 21, 1976, see section 701 of Pub. L. 94-579, set out as a note under section 1701 of this title. (43 U.S.C. § 932 (1988 Ed.)

43 U.S.C. § 1701 Congressional declaration of policy

(a) The Congress declares that it is the policy of the United States that - ****

**** (2) the national interest will be

best realized if the public lands and their resources are periodically and systematically inventoried and their present and future use is projected through a land use planning process coordinated with other federal and State planning efforts; ****

**** (12) the public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber and fiber from the public lands including implementation of the Mining and Minerals Policy Act of 1970 (84 Stat. 1876, 30 U.S.C. 21a) as it pertains to the public lands; and ****

California Revenue and Taxation Code

§ 607.5 Mining or mineral rights

In the event that a separate assessment of rights and privileges appertaining to mines or minerals is made, the descriptive words "mining rights" or "mineral rights" on the

asessment roll shall include the right to enter in or upon the land for exploration, development and production of minerals, including oil, gas and other hydrocarbons.

Colorado Revised Statutes,

Taxation, Valuation of Mines

§ 39-6-116 Nonproducing unpatented mining claims - definitions

"Unpatented mining claims", as used in section 3(1)(b); of article X of the state constitution, includes mining claims located under the federal mining laws, 30 U.S.C. sec. 22 et seq,., for which a patent has not been issued; and such term also includes leasehold interests in real property obtained under the federal "Mineral Lands Leasing Act of 1920", 30 U.S.C.

sec. 181 et seq.

Regulatory Provisions

Code of Federal Regulations Title 36

Parks, Forests, and Public Property

Part 200 to End. (Revised as of 7/1/94)

Part 228 - Minerals

Subpart A- Locatable Minerals

§228.1 Purpose.

It is the purpose of these regulations to set forth rules and procedures through which use of the surface of National Forest System lands in connection with operations authorized by the United States mining laws, (30 U.S.C. 21-54), which confer a statutory right to enter upon the public lands to search for minerals, shall be conducted so as to minimize adverse environmental impacts on National Forest System surface resources. It is not the purpose of these regulations to provide for the management of mineral resources; the responsibility for managing such resources is in the Secretary of the Interior.

§228.3 Definitions.

For the purposes of this part the following terms, respectively, shall mean:

(a) Operations. All functions, work, and activities in connection with prospecting, exploration, development, mining or processing of mineral resources and all uses reasonably incident thereto, including roads and other means of access on lands subject to the regulations in this part, regardless of whether said operations take place on or off mining claims.

*****

§228.4 Plan of operations-notice of intent-requirements.

(a) Except as provided in paragraph (a)(2) of this section, a notice of intention to operate is required from any person proposing to conduct operations which might cause disturbance of surface resources. Such notice of intention shall

be submitted to the District Ranger having jurisdiction over the area in which the operations will be conducted. If the District Ranger determines that such operations will likely cause significant disturbance of surface resources, the operator shall submit a proposed plan of operations to the District Ranger.

(1) The requirements to submit a plan of operations shall not apply: (i) To operations which will be limited to the use of vehicles on existing public roads or roads used and maintained for National Forest purposes. ****

§228.5 Plan of operations-approval.

(a) Operations shall be conducted in accordance with an approved plan of operations, except as provided in paragraph (b) of this section and in §228.4(a),(b), and(e). A proposed plan of operation shall

be submitted to the District Ranger, who shall promptly acknowledge receipt thereof to the operator. The authorized officer shall within thirty (30) days of such receipt, analyze the proposal, considering the economics of the operation along with other factors in determining the reasonableness of the requirements for surface resources protection, and

(1) Notify the operator that he has approved the plan of operations; or

(2) Notify the operator that the proposed operations are such as not to require an operating plan; or

(3) Notify the operator of any changes in, or additions to, the plan of operations deemed necessary to meet the purpose of the regulations in this part; or ****

§228.7 Inspection, noncompliance.

(a) Forest Officers shall periodically inspect operations to determine if the operator is complying with the regulations in this part and an approved plan of operations.

(b) If an operator fails to comply with the regulations or his approved plan of operations and the noncompliance is unnecessarily or unreasonably causing injury, loss or damage to surface resources the authorized officer shall serve a notice of noncompliance upon the operator or his agent in person or by certified mail. ****

§228.12 Access.

An operator is entitled to access in connection with operations, but no road, trail, bridge, landing area for aircraft, or the like shall be constructed or improved, nor shall any other means of

access, including but not limited to off-road vehicles, be used until the operator has received approval of an operating plan in writing from the authorized officer when required by 228.4(a). ****

228.14 Appeals.

Any operator aggrieved by a decision of the authorized officer in connection with the regulations in this part may file an appeal under the provisions of 36 CFR part 251, subpart C.

228.15

**** (b) Holders of unpatented mining claims validity established on any National Forest Wilderness prior to inclusion of such unit in the National Wilderness Preservation System shall be accorded the rights provided by the United States mining laws as then applicable to the National

Forest land involved. Persons locating mining claims on or after the date on which said Wilderness was included in the National Wilderness Preservation system shall be accorded the rights provided by the United States mining laws applicable to the National Forest land involved and subject to provisions specified in the establishing legislation. Persons conducting operations as defined in 228.3 in National Forest Wilderness shall comply with the regulations in this part. Operations shall be conducted so as to protect National Forest surface resources in accordance with the general purposes of maintaining the National Wilderness Preservation System unimpaired for future use and enjoyment as wilderness and to preserve its wilderness character, consistent with the use of the land for mineral location, exploration, development,

drilling, and production and for transmission lines, water lines, telephone lines, and processing operations, including, where essential, the use of mechanized transport, aircraft or motorized equipment.

(c) Persons with valid mining claims wholly within National Forest Wilderness shall be permitted access to such surrounded claims by means consistent with the preservation of National Forest Wilderness which have been or are being customarily used with respect to other such claims surrounded by National Forest Wilderness. No operator shall construct roads across National Forest Wilderness unless authorized in writing by the Forest Supervisor in accordance with 228.12.****

Part 251 - LAND USES

251.53 Authorities.

Subject to any limitations contained

in applicable statutes, the Chief of the Forest Service, or other Agency official to whom such authority is delegated, may issue special use authorizations for National Forest System land under the authorities cited and for the types of use specified in this section as follows:

**** (e) Easements for rights~of-way for pipeline purposes for the transportation of oil and gas and products thereof where no Federal land other than National Forest System land is required, and permits for the construction, operation, maintenance or termination of a pipeline or to protect the natural environment or the public safety under section 28 of the Mineral Leasing Act of 1920, 41 Stat. 449, as amended, (30 U.S.C. 185);****

251.82 Appealable decisions.

(a) The rules of this subpart govern

appeal of written decisions of Forest Service line officers related to issuance, denial, or administration of the following written instruments to occupy and use National Forest System lands, including but not limited to:

(1) Permits for ingress and egress to intermingled and adjacent private lands across National Forest System lands, 36 CFR 212.8 and 212.10.

(2) Permits and occupancy agreements on National Grasslands and other lands administered under the provisions of title III of Bankhead-Jones Farm Tenant Act issued under 36 CFR 213.3.

(3) Grazing and livestock use permits issued under 36 CFR part 222, subpart A.

(4) Mining plans of operation under 36 CFR part 228, subpart A.

(5) Mining operating plans for the Sawtooth National Recreation Area issued

under 36 CFR 292.17 and 292.18.

(6) Permits and agreements regarding mineral materials (petrified wood and common varieties of sand, gravel, stone, pumice, pumicite, cinder, clay and other similar materials) under 36 CFR 228, subpart C.

(7) Permits authorizing exercise of mineral rights reserved in conveyance to the United States issued under 36 CFR part 251, subpart A.

(8) Special use authorizations issued under 36 CFR part 251, subpart B, except as provided in 251.60(g), for suspension of termination of easements issued pursuant to 36 CFR 251.53(e) and (e)(1).

(9) Permits for uses in Wilderness Areas issued under 36 CFR 293.3.

(10) Permits to excavate and/or remove archaeological resources issued under the Archaeological Resources Protection Act

1979 and 36 CFR part 296.

(11) Approval/non-approval of Surface Use Plans of Operations related to the authorized use and occupancy of a particular site or area.****

Subpart C - Appeal of Decisions Relating to Occupancy and Use of National Forest System Lands

**** 251.95 Authority of reviewing officer.

(a) Discretion to establish procedures. A Reviewing Officer may issue such procedural orders as deemed appropriate to ensure orderly, expeditious, and fair conduct of an appeal providing they are consistent with other provisions of this part.

(1) In appeals involving intervenors, the Reviewing Officer may prescribe special procedures to conduct the appeal.

(2) All parties to an appeal shall receive notice of any orders or decisions on the conduct of the appeal.

(3) Orders and determinations governing the conduct of an appeal are not subject to appeal and further review.****

**** 251.97 Oral presentation.

(a) Purpose. An oral presentation provides an additional opportunity for an appellant, and other parties to an appeal to present their viewpoints to the Reviewing Officer. The purposes is to restate, emphasize, and/or clarify information related to an appeal. Oral presentations are to be conducted in an informal manner and shall not be subject to formal rules of procedure such as those applicable to judicial proceedings.****

**** 251.98(b) Appeal record.

The following rules apply only to the appeal record for appeals at the first level (251.87(a),(b)):****

**** (b) The record consists of the documents filed with the Reviewing Officer including, but not limited to, the notice of appeal, responsive statement, replies to submissions by various parties to the appeal, orders and determinations made on the conduct of the appeal, and correspondence. ****

Code of Federal Regulations, Title 43
Public Lands: Interior Parts 1 to 999
(Revised as of 10/1/94)
Part 4 - Department Hearings and Appeals Procedures Subpart B-General; General Rules Relating to Procedures and Practice.

4.23 Transcript of hearings.

Hearings will be recorded verbatim and

transcripts thereof shall be made when requested by interested parties, costs of transcripts to be borne by the requesting parties.****

4.24 Basis of decision.

(a) Record. (1) The record of a hearing shall consist of the transcript of testimony or summary of testimony and exhibits together with all papers and requests filed in the hearing.

(2) If a hearing has been held on an appeal pursuant to instruction of an Appeals Board, this record shall be the sole basis for decision insofar as the referred issues of fact are involved except to the extent that official notice may be taken of a fact as provided in paragraph (b) of this section.****

4.26 Subpoena Power and witness provisions generally.

(a) Compulsory attendance of

witnesses. The administrative law judge, on his own motion, or on written application of a party, is authorized to issue subpoenas requiring the attendance of witnesses at hearings to be held before him or at the taking of depositions to be held before himself or other officers.****

4.27 Standards of conduct.

****(c) Disqualification. An administrative law judge or Board member shall withdraw from a case if he deems himself disqualified under the recognized canons of judicial ethics. If, prior to a decision of an administrative law judge or an Appeals Board, there is filed in good faith by a party an affidavit with substantiating facts, and the administrative law judge or Board member concerned does not withdraw, the Board or the Director, as appropriate, shall determine the matter of disqualification.

Subpart E-Special Rules Applicable to Public Land Hearings
and Appeals

4.415 Request for hearings on appeals involving questions of fact.

Either an appellant or an adverse party may, if he desires a hearing to present evidence on an issue of fact, request that the case be assigned to an administrative law judge for such a hearing. Such a request must be made in writing and filed with the Board within 30 days after answer is due and a copy of the request should be served on the opposing party in the case. The allowance of a request for hearing is within the discretion of the Board, and the Board may on its own motion, refer any case to an administrative law judge for a hearing on an issue of fact. If a hearing is ordered, the Board will specify the issues upon

which the hearing is to be held and the hearing will be held in accordance with 4.430 to 4.439, and the general rules in Subpart B of this part.

4.423 Subpoena power and witness provisions.

The administrative law judge is authorized to issue subpoenas directing the attendance of witnesses at hearings to be held before him or at the taking of depositions to be held before himself or other officers, for the purpose of taking testimony but not for discovery.

4.433 Authority of the administrative law judge.

The administrative law judge is vested with general authority to conduct the hearing in an orderly and judicial manner, including authority to subpoena witnesses and to take and cause depositions to be taken for the purpose of taking testimony

but not for discovery in accordance with the Act of January 31, 1903 (32 Stat. 790: 43 U.S.C. 102-106), to administer oaths, call and question witnesses, to make proposed findings of fact and to take such other actions in connection with the hearing as may be prescribed by the Board in referring the case for hearing.

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4.434 Conduct of hearing.

So far as not inconsistent with the prehearing order, the examiner may seek to obtain stipulations as to material facts. Unless the administrative law judge directs otherwise, the appellant will present his evidence on the facts at issue following which the other parties and the Bureau of Land Management will present their evidence on such issues.

4.435 Evidence.

(a) All oral testimony shall be under

oath and witnesses shall be subject to cross-examination. The administrative law judge may question any witnesses. Documentary evidence may be received if pertinent to any issue. The administrative law judge will summarily stop examination and exclude testimony which is obviously immaterial.

(b) Objections to evidence will be ruled upon by the administrative law judge.****

4.437 Copies of transcript.

Each party shall pay for any copies of the transcript obtained by him. Unless a summary of the evidence stipulated to, the Government will file the original copy of the transcript with the case record.

4.439 Action by administrative law judge.

Upon completion of the hearing the incorporation of the summary or transcript in

the record, the administrative law judge will send the record and proposed findings of fact on the issues presented at the hearing to the Board.****

Code of Federal Regulations, Title 43 Public Lands: Interior Parts 1000 to 3999 (Revised as of 10/1/93) Subpart 3736-Mining Operations

3736.1 Placer locator to conduct no mining operations for 60 days.

3736.2 Hearing: notice of protest.

(a) If a hearing is to be held, notice of the hearing will be delivered personally or by registered mail or certified mail to the locator of the placer claim. The notice will indicate the time and place of hearing. The procedures with respect to service of notice of hearing and conduct thereof shall follow the provisions of the Depart-

ment of the Interior (Part 1850) of this title) in effect at the time of the hearing.****

(c) Following the hearing, the administrative law judge will render a decision, subject to the right of appeal by any person admitted as a party to the hearing in accordance with the provisions of appeals and contests of the Department of the Interior (Part 1850 of this title.) ****

Subpart 3802-Exploration and Mining, Wilderness Review
Program.

3802.4-2 Access.

(a) An operator is entitled to non-exclusive access to his mining operations consistent with the provisions of the United States mining laws and Department of the Interior regulations. ****

Subpart 3809-Surface Management

3809.4 Appeals.

(a) Any operator adversely affected by a decision of the authorized officer made pursuant to the provisions of this subpart shall have a right of appeal to the State Director, and thereafter to the Board of Land Appeals, Office of Hearings and Appeals, pursuant to Part 4 of this title, if the State Director's decision is adverse to the appellant.****

APPENDIX E

(Vol. 43, Op. No. 26)

OPINION OF THE ATTORNEY GENERAL OF

THE UNITED STATES

RIGHTS-OF-WAY ACROSS NATIONAL FORESTS

The Act of June 4, 1897, does not grant a right of access to owners of land surrounded by national forests, other than actual settlers, and the Secretary of Agriculture has discretionary authority to deny such access unless a right otherwise exists.

The common law doctrine of easement by necessity does not apply to land owned by the Federal Government, but a right of access may be implied from the terms of a Federal land grant in some circumstances. No statutes currently modify any such implied right found to exist.

Absent a prior existing access right, the Secretary of Agriculture may deny "adequate access" to land within a National

Forest wilderness area, but must offer a land exchange as indemnity.

June 23, 1980

THE SECRETARY OF AGRICULTURE

My Dear Mr. Secretary: This replies to your letter of September 18, 1979, requesting my opinion on several questions concerning access rights of private owners of land located within the boundaries of the national forest. Your letter poses the following questions:

(1) Whether the Organic Act of June 4, 1897,[1] grants to private landowners,[2] other than actual settlers, a right of ingress to and egress from their properties located within the exterior boundaries of the

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[1]Act of June 4, 1897, ch. 2. § 1. 30 Stat. 36 (codified at 16 U.S.C. 478).

[2]As used in this opinion, the term "private landowners" refers to all non-federal landowners unless otherwise indicated.

national forests or whether you may deny such access:

(2) Whether private landowners with property located within the exterior boundaries of the national forests have a right-of-way across national forest lands by implied easement or easement by necessity enforceable against the Federal Government; and, if so, whether this right-of-way is limited to those instances in which the United States by its conveyance created a situation in which nonfederal lands are surrounded by public lands;

(3) Whether, if a right-of-way exists across national forests, it has been modified by:

(a) The Organic Act of June 4, 1897, 16 U.S.C. 478;

(b) The Wilderness Act, § 5(a), 16 U.S.C. 1134(a;

(c) The Act of October 13, 1964, 16

U.S.C. 532-538;

(d) The Montana Wilderness Study Act of 1977, §3, 16 U.S.C. 1132 note; or

(e) any other statute; and

(4) Whether §5(a) of the Wilderness Act, 16 U.S.C. 1134(a), authorizes you to deny access and offer as indemnity an exchange of national forest land for private land, or whether the private landowner may insist on a right of access.

I conclude, first, that the Organic Act of June 4, 1897, does not grant a right of access to owners of land surrounded by national forest, other than actual settlers, and that you have discretionary authority to deny such access, provided that a right of access does not otherwise exist. Of course, access cannot be denied arbitrarily.

Second, in my opinion, the common law doctrine of easement by necessity does not

apply to land owned by the Federal Government. A right of access may be implied from the terms of a Federal land grant only if Congress intended to grant the right. This intent may be shown from the circumstances surrounding the grant, including the purpose for which it was made.

Third, none of the statutes you have asked us to consider, nor any others that we have found, would modify such a right in any case in which it is found to exist.

Fourth, I conclude that, absent a prior existing access right, you may deny "adequate access" under the Wilderness Act, but you must offer a land exchange as indemnity.

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IV.

Your final question concerns §5 (a) of the Wilderness Act, 16 U.S.C. 1134(a). Your

Department has concluded that this provision guarantees a private owner "adequate access" to an inholding unless the landowner voluntarily chooses a land exchange. Pursuant to this interpretation, regulations have been promulgated providing that access "shall be given."[37] The Department of the Interior has taken the position that section 5(a) grants the Secretary of Interior (and, by analogy, the Secretary of Agriculture) the authority to deny access

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[37]36 C.F.R. §293.12. This regulation provides in part: States or persons, and their successors in interest, who own land completely surrounded by national Forest Wilderness shall be given such rights as may be necessary to assure adequate access to the land. "Adequate access" is defined as the combination of routes and modes of travel which will as determined by the Forest Service, cause the least lasting impact on the primitive character of the land and at the same time will serve the reasonable purposes for which the State and private land is held or used. This regulation is consistent with your Department's interpretation of 16 U.S.C. 478. See 36 C.F.R. §212.8(b).

to a landowner, and offer land exchange as indemnity.[38] The Interior Department's interpretation, contrary to yours, under appropriate circumstances would allow

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[38]Supplemental Memorandum In Support of Plaintiff's Motion for Permanent Injunction, at 14-19, United States v. Cotter, Corp., No. C 79-0307 (D. Utah Oct. 1, 1979). The current regulation of the Interior Department's Fish and Wildlife Service, 50 C.F.R. 35.13, although somewhat ambiguous, restricts access to means and routes which will "preserve the wilderness character of the area." The regulation provides:

> Rights of States or persons and their successors in interest, whose land is surrounded by a wilderness unit, will be recognized to assure adequate access to that land. Adequate access is defined as the combination of modes and routes of travel which will be preserve the wilderness character of the landscape. Mode of travel designated shall be reasonable and consistent with accepted, convention, contemporary modes of travel in said vicinity. Use will be consistent with reasonable purposes for which such land is held. The Director will issue such permits as are necessary for access, designating the means and route of travel for ingress and degress (sic) so as to preserve the wilderness character of the area.

Id.

denial of "adequate access" to private holdings as well as to State-owned inholdings.

Some initial observations about the Wilderness Act are in order. The purpose of the Wilderness Act is to "secure for the American people of present and future generations the benefits of an enduring resource of wilderness. 16 U.S.C. 1131(a). "Wilderness" is defined as an area of "undeveloped federal land retaining its primeval character and influence, without permanent improvements or human habitation." 16 U.S.C. 1131(c). Section 4(c) of the Act prohibits, with limited exceptions, use of motor vehicles or other mechanical transportation. 16 U.S.C. 1133(c). It also, prohibits permanent roads within any wilderness area, except as specifically provided in the Act, and subject to "existing private rights." Id. The Act

directs you to administer wildness areas within your jurisdiction so as to preserve their wilderness character. 16 U.S.C. 1133(b). The phrase "existing private rights" in section 4(c), 16 U.S.C. 1133(c), is not defined in the Act or in its legislative history, but, in my opinion, includes existing easements, which are well-recognized rights in property.[39]

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[39]See. e.g. United States v. Welch, 217 U.S. 333, 339 (1910); Meyers v. United States, 378 F.2d 696, 703 (Ct. Cl. 1967). It logically could be argued that the phrase "existing private rights" includes and preserves only those rights which had been exercised at the time the Wilderness Act was passed. Little support exists, however, for this argument that Congress intended to extinguish unexercised access rights, leaving the landowner with only the right to access or exchange under § 5(a). When providing for preservation only of established uses, Congress clearly so indicated. See 16 U.S.C. 1133(d)(1) permitting established uses of aircraft and motorboats). In S. Rep. No. 109, 88th Cong., 1st Sess. 2 (1963), the Committee stated that under the Wilderness Preservation System, "existing private rights and established uses" are permitted to continue. (Emphasis added). A way of access to which a person is entitled by

Thus, in spite of the Act's general prohibitions, if a private inholder has an implied right to a particular type of access, that right is preserved.

The Wilderness Act was developed over a 15-year period, with almost unprecedented citizen participation. See S. Rep. No. 109, 88th Cong., 1st Sess. 7 (1963). The first major wilderness bill was introduced in the 85th Congress. S. 1176, 85th Cong., 1st Sess. (1957). In 1961, the Senate passed a wilderness bill, S. 174, but the House failed to pass it. In 1963, S. 4 was introduced in the 86th Congress. It was identical to S. 174, with one exception not relevant here. It passed the Senate by a large margin (110 Cong. Rec. 17458 (1964)), but was amended in the House (110 Cong.

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express or implied grant predating the Wilderness Act is a right which existed prior to the effective date of the Act, whether exercised or unexercised.

Rec. 17461 (1964)). A conference committee was convened and adopted with few amendments the House version of the bill, H.R. 9070. See H.R. Rep. No. 1829, 88th Cong., 2d Sess. (1964). The conference bill was approved by both houses (110 Cong. Rec. 20603, 20632 (1964)) and signed by the President on September 3, 1964.

Section 5(a) of the Act deals with State and private property completely surrounded by wilderness areas. It provides:

> In any case where State-owned or privately owned land is completely surrounded by national forest lands within areas designated by this chapter as wilderness, such State or private owner shall be given such rights as may be necessary to assure adequate access to such State-owned or privately owned land by such State or private owner and their successors in interest, or the State-owned land shall be exchanged for federally owned land in the same State of approximately equal value under authorities available to the Secretary of Agriculture: Provided, however, that the United States shall not transfer to a State or private owner any mineral interests unless the State or private

owner relinquishes or causes to be relinquished to the United States the mineral interest in the surrounded land.

Since the enactment of the Wilderness Act, your Department has interpreted this language to preserve the statutory right of access you found in 16 U.S.C. 478.[40] Because, in my opinion, section 478 does not grant a right of access to inholders other than actual settlers. the question presented here is whether section 5(a) grants to inholders a broad right of "adequate access" beyond any existing private rights. I believe it does not.

The term "adequate access" is not defined in the Act, but the legislative history makes clear that the term includes access not consistent with wilderness uses.[41] For example, in both the Senate

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[40]See note 37 supra

[41]Other sections apply to uses consistent with wilderness preservation. In section 5(b), 16 U.S.C. 1134(b), Congress provided

and House debates, repeated references were made to road construction for motorized vehicles. See, e.g., 107 Cong. Rec. 18105 (1961); 109 Cong. Rec. 5925-26 (1963). Accordingly, your regulation defining "ade-

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that where valid mining claims or other valid occupan[c]ies are surrounded by a national forest wilderness, permit ingress to and egress from such surrounded areas by means which have been or are being customarily enjoyed with respected to similarly situated areas. Cf. 16 U.S.C. 1133(d) (provides for regulation of ingress and egress consistent with use of land for mineral exploration and development). Section 5(b) did not appear in either S. 174 or S. 4. it did appear in several early House versions of the bill, and these versions expressly included "privately owned lands" in addition to valid mining claims and other valid occupancies. This reference to privately owned lands was deleted in later version of the bill, such as H.R. 9070. The reports do not explain this deletion. It may have occurred because of the decision during the same session to include privately owned land in section 5(a).

The final paragraph of §5, 16 U.S.C. 1134(c) authorizes you to acquire state or privately owned land only if either the owner concurs or Congress specifically authorizes the acquisition.

42 See 36 C.F.R. § 293.12, note 27 supra.

quate access" does not limit access to established uses or to means consistent with wilderness uses. It includes access which "will serve the reasonable purposes for which the state and private land is held or used."[42] What constitutes adequate access will depend on the facts and circumstances of each case, and is a determination left to your discretion.

The Act requires that the state or private inholder be given such rights as are necessary to assure adequate access, or that the land be exchanged for federally owner land of approximately equal value. The language of § 5(a) indicates that a landowner has a right to access or exchange. If he is offered either, he has been accorded all the rights granted by the statute. If you offer land exchange, the

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[42]See 36 C.F.R. § 293.12, note 27 supra.

landowner has no right of access under § 5(a). This interpretation is supported by the legislative history of the section.[43]

The language of § 5(a) first appeared in an amendment to S. 174, 87th Cong., 1st Sess. (1961). Senator Bennett of Utah pro-

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[43]Your Department relies on the legislative history of subsequent legislation to support its contention that §5(a) grants a right to adequate access to inholders. In a report filed in conjunction with the Indian Peaks Wilderness Area, et al., 16 U.S.C. 1132 note, the House Committee noted that § 5 of the Wilderness Act requires the Secretary to give private landowners adequate access. H.R. Rep. No. 1460. 95th Cong., 2d Sess. 9-10 (1978). The report does not discuss the exchange option.

This legislative observation is not a part of the legislative history of the Wilderness Act. It is the intent of the Congress that enacted a law that controls interpretation of that law. United Airlines, Inc. v. McMann, 434 U.S. 192, 200 n. 7 (1977); Teamsters v. United States, 431 U.S. 324, 354 n. 39 (1977). Whatever evidence is provided by the report on the subsequent legislation is overcome by conflicting evidence. See Southeastern Community College v. Davis, 442 U.S. 397, 411-12 (1979); Oscar Mayer & Co. v. Evans, 441 U.S. 750, 758 (1979).

posed the amendment in response to concerns of the Western Association of Land Commissioners, and accordingly, the amendment pertained only to state-owned land. 107 Cong. Rec. 18092 (1961).[44] The Senator

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[44]The resolution passed by the Western State Land Commissioners suggested that the bill be amended to contain the following provisions:

> Whenever an area including S[t]ate-owned land is incorporated in the wilderness system, provision shall be made for access to such land adequate for the reasonable exercise of its rights therein by the State and those claiming under it.... Provided, however, that, if the recommendation by which area including State-owned land is incorporated in the wilderness system shall fail to provide for access to the State-owned land therein, then the owning State may, at its election, use the included State land as base in making indemnity selection of lands, including the mineral rights therein as provided in applicable U.S. statutes.

107 Cong. Rec. 18103 (1961). The resolution illustrates that the Commissioners also believed access could be denied. The indemnity statutes to which the resolution refers, 43 U.S.C. 851, 852, allow states to make indemnity selections whenever school sections are lost because of other reservations or grants of land.

identified a series of "loopholes" in the bill. He described the thirteenth loophole as follows: "No provision is made in S. 174 to preserve the right of access to State school sections or other lands. This should certainly be done or alternatively, the States should be permitted to choose Federal lands in another location in lieu of the land isolated within wilderness areas." Id. The choice referred to by Senator Bennett was the choice of lands if access were denied, not the choice of either access or exchange. He stated that the purpose of his amendment was to "give the States access to State lands within wilderness areas established under the bill, or indemnify the States for loss of such access." 107 Cong. Rec. 18103 (1961). He did not indicate that a state could choose between access and indemnity. His

amendment provided in part:

> In any case where State-owned land is completely surrounded by lands incorporated into the wilderness system such State shall be given (1) such rights as may be necessary to assure adequate access to such State-owned land by such State and its successors in interest, or (2) land in the same State, not exceeding the value of the surrounded land, in exchange for the surrounded land. Exchanges of land under the provisions of this subsection shall be accomplished in the manner provided for the exchange of lands in national forests.

107 Cong. Rec. 18103 (1961). In urging support of his amendment, Senator Bennett explained:[45]

> (T)he Western Association of State Land Commissioners unanimously adopted a resolution calling for indemnification to the States which will lose access to State lands in wilderness areas established under S. 174. Where State school sections or other State lands are isolated by wilderness areas, the State should be given an opportunity, if access is denied, to make in lieu selections of Federal lands in other

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[45]Authority to exchange land is provided by 16 U.S.C. 485, 486 original enacted as Act of March. 20, 1922, Ch. 105, 42 Stat. 465) and 16 U.S.C. 516 (originally enacted as Act of Mar. 3, 1925, ch. 473, 43 Stat. 1215).

areas.

Id. (emphasis added).[46] These statements demonstrate that Senator Bennett believed that access not consistent with wilderness preservation could be denied, and wanted to give states an alternative in such circumstances.

The Senator later explained that his amendment was designed to correct problems states had experienced with land exchanges in the past. 107 Cong. Rec. 18105 (1961). He wanted to ensure that if the state land was "locked up," the state clearly would be entitled to an exchange. He further explained:

> The first choice, providing that the State shall have adequate access, would in fact defeat the value of the wilderness bill, assuming there were a very

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[46]His belief that access to state-owned lands may be denied entirely may result in part from the language of § 4(c), 16 U.S.C. 1133(c), which specifically protected only existing private rights. He made no statements relying on this language, however.

> valuable mineral in a State school section, and the State were to decide that it was worth money to drive a road through the wilderness to get to it. This would change the situation with respect to existing law, because we would be imposing particular restrictions, in spirit at least, with respect to access to the land.

Id. (emphasis added).

Because of misunderstandings regarding the effect of the proposed amendment on mineral lands, Senator Bennett withdrew the amendment to allow time to confer with other Senators from Western States. He re-offered the amendment the following day, with minor changes not relevant here. 107 Cong. Rec. 18384 (1961). Senator Church, who earlier had expressed reservations about the amendment, now voiced his support. In his brief remarks, he stated:

> I think the amendment is fair to the State involved. If they need rights of access, they should have them; if they want to relinquish the land, they ought to have the right to acquire other land of comparable value.

Id. Although we can infer from these

remarks an understanding that the section gives States the option of choosing access or exchange, the statement does admit of other interpretations. In light of the evidence to the contrary, the resolution of this question cannot be rested on the remarks of one senator during debate on the Senate floor, where "the choice of words... is not always accurate or exact." In re Carlson, 292 F. Supp. 778, 783 (C.D. Cal. 1968), citing United States v. Internat'l Union UAW-CIO., 352 U.S. 567, 585-86 (1957). If the Congress had intended to grant landowners a right to adequate access, it could have done so expressly. Resolving the doubt in favor of the grantee of such a right would violate the well-established rule that any doubts as to congressional grants of property interests must be resolved in favor of the government. Andrus v. Charleston Stone

Prod. Co., 436 U.S. 604, 617 (1978); United States v. Union Pac. R.R., 353 U.S. 112, 116 (1957).

The Senate agreed to Senator Bennett's amendment to S. 174, but S. 174 did not pass the House during the 87th Congress. A House version of the bill did not include a similar provision, also applicable only to State-owned land. The House report on this bill indicated that the section required only that a state be given either access or exchange: it did not indicate that the state could choose between them, or that adequate access otherwise was guaranteed. It stated:

> If surrounded land is owned by a State, the State would be given either right of access or opportunity of exchange... Ingress and egress would provided for all valid occupancies.

H.R. Rep. No. 2521, 87th Cong., 2d Sess. 108 (1962)(emphasis added).

Variations of Senator Bennett's amendment appeared in both the Senate and House versions of the wilderness legislation in the 88th Congress. S. 4, 88th Cong., 1st Sess. § 3(j)(1963); H.R. 9070, 88th Cong., 2d Sess. §6(a)(1964). The Senate committee report on S.4 indicates that the understanding that states could be denied access and offered a land exchange as indemnity remained unchanged:

> Section 3(j) provides that where State inholdings exist in wilderness areas, the State shall be afforded access, or shall be given Federal lands in exchange of equal value.
>
> ....
>
> The amendment is an attempt to clarify the intention of the Senate in regard to section 3(j), which was originally proposed, withdrawn, revised, again proposed and adopted during floor

consideration of S. 174 in 1962 [sic]. The amended section represents a more deliberate and careful drafting and consideration.

S. Rep. No. 109, 88th Cong., 1st Sess. 10, 20-21 (1963).

The House modified this section to include "privately owned land" in the first paragraph regarding "adequate access," rather than in the second paragraph regarding "ingress and egress." This modification is not explained in the House report. See H.R. Rep. No. 1538, 88th Cong., 2d Sess. 13 (1963). The change was discussed in both the Senate and House hearings, however. The sentiment expressed was that private owners should have the same rights as the States. National Wilderness Preservation Act: Hearings on H.R. 9070, H.R. 9162, S. 4 and Related Bills, Before the Subcomm. on Public Lands of the House Comm. on Interior

and Insular Affairs, 88th Cong., 2d Sess. 1369-72 (1963). Both public witnesses and congressmen stated that ingress and egress was uncertain under both 16 U.S.C. 478 and the wilderness acts, and that the same provision for exchange should be made for private owners as was made for States. Id. There is no indication that this addition of privately owned lands modified the purpose of the section as identified by Senator Bennett.

In sum, if uses are well-established prior to wilderness designation, they may be permitted to continue.[47] In addition,

[47]Section 4(d)(1) of the Act, 16 U.S.C. 1133(d)(1) provides that the "use of aircraft or motoboats, where these uses have already become established, may be permitted to continue subject to such restrictions as the Secretary of Agriculture deems desirable." The committee reports reveal an intent that other well-established uses also be permitted to continue. See e.g., S. Rep. No. 109, 88th Cong., 1st Sess. 2, 10 (1963). See also 109 Cong. Rec. 5926 (1963) (Senator Church, a sponsor of the bill, expressed the view

all existing private rights of access are preserved. Even if the landowner has no prior existing right to access not consistent with wilderness uses, the Wilderness Act requires that "adequate access" be given or that an offer be made to the landowner to exchange the land for Federal land of approximately equal value. As a result of §5(a), therefore, the inholder actually may possess more access "rights" than were possessed prior to wilderness designation. If the landowner rejects an offer of land exchange, he may retain title to the inholding and exercise access rights consistent with wilderness uses, or he may consent to acquisition of his land by the Federal Government.

These responses to the questions you

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that owners of ranches be allowed to continue "the customary usage of their property for ingress and egress according to the customary ways").

have asked should provide satisfactory guidance in your performance of your Federal land management responsibilities.

Sincerely,

BENJAMIN R. CIVILETTI.

(Ninth Circuit - Excerpt of Record pp 129-139)

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

LEROY CLOSUER and SHARON CLOUSER (Owners) of the Robert E. Mining Claims CARL E. SETERA, JUDITH M. SETERA, ANTHONY S. SETERA and LOIS A. SETERA (Owners of the Thunderbolt Mining Claims), GARY HOEFLER, DON WURSTER, CAMERON ANDERSON and ROBIN ANDERSON (Owners of the Wilson Mining Claim), Plaintiffs, v. EDWARD MADIGAN, Secretary of Agriculture United States of America, DALE ROBERTSON, Chief Forester, Forest Service, JOHN BUTRUILLE, Regional Forester, Pacific Northwest Region, JEFF BLACKWOOD, Forest Supervisor, Umatilla National Forest,	CIVIL NO. 91-3-DA AFFIDAVIT OF BRONSON C. LA MOURE

CRAIG SMITH DIXON, District Ranger, North Fork John Day Ranger District, MIKE LUNN, Forester Supervisor, Siskiyou National Forest, DENNIS HOLTHUS, District Ranger, Illinois Valley Ranger District, MANUEL LUJAN, Secretary of the Interior, CY JAMISON, Director of Bureau of Land Management, D. DEAN BIBLE, State Director, Oregon State Office,

Defendants.

STATE OF _____) ss.
County of _____)

I, Bronson C. LaMoure, a resident of Missoula, Montana, being first duly sworn on oath, depose and say as follows:

1. I have personal, first hand knowledge of the facts as recited herein and am competent to testify as to the matters stated in this affidavit.

2. I have been requested by the Plaintiffs in the above requested matter to provide information about my qualifications

and answers to certain questions based on my knowledge and experience relating to policies and practices for Forest Service administration of the United States Mining Laws and the Wilderness Act for regulating unpatented mining claim operations on national forest lands in wilderness areas.

3. My education and experience are as follows:

a. B.A. and M.S., in geology from the University of Montana.

b. Certificate, Senior Executive Ranking, Department of Agriculture Executive Training Program in 1987.

c. My general experience includes 3 years experience as a Forest Service geologist; 2 years as a minerals staff officer; 8 years as Director, Minerals and Geology at Missoula, Montana; and 4 years as Director, Minerals and Geology for the Forest Service at Washington, D.C. from

1986 to 1990. I retired from the Forest Service in 1990 and have been engaged in business as a consultant in a broad range of environmental and other natural resource enterprise.

d. My specialized experience in the 1970s and from 1986 to 1990 included: (a) Developed regulations governing operation of the National Policy Act, Threatened and Endangered Species Act, Clean Air Act, mining and environmental laws and mineral leasing laws; (b) Coordinated policy with state and local jurisdictions on access and trespass to public lands, range watershed, wildlife and recreation restrictions, fire management and forestry issues with close coordination of programs with the Bureau of Land Management; (c) Served as principal Forest Service consultant to the Department of Energy and Interior and the Nuclear Regulatory Commission and interacted with

involved parties on issues of cross-jurisdictional concern to resolve and streamline conflicting policies; (d) During the 1970s, provided technical assistance for Surface Environment and Mining (SEAM) research, planning, and application projects to assist Forest Service land managers with specific problems that arise during mineral exploration, leasing, development and land reclamation. The questions asked and my answers are as follows:

Question No. 1:

What were the policies and practices of the Department of the Interior and the Forest Service, Department of Agriculture in exercising their respective authorities for administering the National Forest Laws, the Wilderness Act, the United States Mining Laws for regulating mining claim operations and determining unpatented mining claim

rights to conduct mining operations.

Answer to Question No. 1:

The Department of the Interior and the Forest Service, Department of Agriculture coordinated their respective jurisdictions and responsibilities on a cooperative intergovernmental basis required to harmoniously accomplish, national forest, wilderness and mineral programs established by Congress consistent with federal and state environmental and land reclamation standards without materially interfering with the possessory rights of operators to conduct mining operations.

Question No. 2:

What were the Forest Service policies and practices for regulating unpatented mining claim operations to accomplish program objectives without materially interfering with the possessory rights of operators?

Answer to Question No. 2:

The Forest Service policies for mineral development and removal operations under 16 U.S.C. Section 1133(d)(3) following January 2, 1984, were to accomplish the minerals programs of the Wilderness Act and Minerals Policy Act, 30 U.S.C. Section 21a, by promoting economical mineral development and removal on unpatented mining claims where valid existing rights had been established by having located valuable minerals prior to January 1, 1984. To assure that mineral development and removal was accomplished under environmental standards to the extent feasible without materially interfering with mining operations, and without unnecessary destruction of surface resources, the Forest Service policy was to require mining operators to comply with Forest Service regulations by filing notices of intent and

plans of operations where mining operations might or will significantly disturb resources.

The Forest Service policy was to approve all mining operations with reasonable measures to minimize adverse environmental impacts to the extent feasible without materially interfering with mining operations. However, the practices of Forest Service district ranger, forest supervisor and regional forester offices, in applying the Forest Service policy, varied. Mining operators sometimes objected to the decisions or actions of these offices where planned mining operations had been denied or where the measures that provided for approval of operations unreasonably increased burdens and costs and were regarded by the operators as unnecessary or as materially interfering with their operations.

Question No. 3:

What were the Forest Service policies for review of of (sic) objections from mining operators to Forest Service decisions denying planned operations or imposing environmental measures that were unacceptable to operators?

Answer to Question No. 3:

The Forest Service policy was to afford operators opportunity to have decisions reviewed under Forest Service regulations which specified procedures for appeal and review of disputes over need and reasonableness of measures provided to minimize adverse environmental impacts.

Question No. 4:

Explain any Forest Service practices which deterred consistent application of policies in support of the national forest minerals program for approval of plans of mining operations under environmental and reclamation standards without materially

interfering with possessory rights of mining operators.

Answer to Question No. 4:

In my evaluations of actions of Forest Service offices on plans of operations, I found that the practices of the various offices were not always uniform and that some Forest Service officials considered and acted on plans of mining operations based on perceptions of minerals programs, resource production and interrelated public interests which were contrary to the policies for approval of mining operations consistent with the program for economic prospecting, development and removal of national forest minerals under the environmental and reclamation standards.

The most common perception underlying inconsistent practices was the idea that a prosecution approach was to be taken in considering plans of operations based on

the premise that there was no distinction in the policies for unauthorized nonmining activities on mining claims and mining operations which were to be conducted in conformity with federal and state laws. The policies were distinctive. As to nonmining activities, the policies called for vigorous prosecution and removal of unauthorized cabin or home occupancies on mining claims and for banning unregulated destructive] mining which threatened national forest resources and burdened local governments and communities.

On the other hand, the policies encouraged and required surface uses for planned mining operations under the environmental and reclamation standards to be approved by the Forest Service.

Due to the magnitude of national forest resource programs and diversity of policies, public interests and disciplines for

the accomplishment of those programs, Forest Service corrective administrative actions did not invariably eliminate confusion over the minerals program policies and practices for approving plans of operations without materially interfering with possessory rights.

Question 5:

What were the Forest Service policies for resolving disputes between the Forest Service and mining operators where the operators asserted that the Forest Service decisions provided measures for protection of the environment, or that the denial of planned motorized access and mining operations materially interfered with the operators' mining operations in violation of law?

Answer to Question 5:

It was the policy of the Forest Service to investigate the validity and possessory

rights of unpatented mining claims under a cooperative arrangement with the Department of the Interior, and to have disputed rights adjudicated and determined under Department of the Interior rules for hearings and appeals.

Question No. 6:

Describe situations where Forest Service decisions or actions in managing surface resources under plans of operations raised disputes over material interference with mining operations and diminishment of possessory rights which required determination by the Department of the Interior.

Answer to Question No. 6:

It is my opinion that government policies required disputes over interference with mining claim rights arising from Forest Service actions on plans of operations to be determined by the Department of the

Interior under its hearing and appeals procedures in every case, except where mining operators failed to cooperate by filing plans of operations for Forest Service approval and commenced operations which the Forest Service found might significantly disturb surface resources or result in destruction of nation forest resources in violation of 16 U.S.C. Section 551 and Forest Service regulations, presenting matters for judicial action and determination.

It is my opinion that government policies dictate that the following disputes arising from Forest Service actions on plans of operations required referral and determination by the Department of the Interior:

a. Disputes as to whether or not existing roads or trails were established as public highways under Revised Statutes 2477 prior

to inclusion lands in national forests.
b. Disputes over the denial of motorized access over existing roads as materially interfering with mining operations and diminishing mining claim possessory rights.
c. Disputes over measures, limitations or restrictions for the protection of surface resources and reclamation of lands which were asserted to materially interfere with mining operations and possessory rights.
d. Disputes over application of the Wilderness Act customary means provision 16 U.S.C. 1134(b) asserted to materially interfere with mining operations and possessory rights.

I make this affidavit in good faith and in support of the within motion for summary judgment to the extent that such motion is consistent with the answers that I have stated in this affidavit. I also declare and verify under penalty of perjury that

the foregoing statements are true and correct.

Dated:

s/Bronson C. LaMoure

Subscribed and sworn to before me this 18 day of Nov, 1991, at Missoula, Montana.

s/ Elizabeth L. Gleason
Notary Public for Montana
My commission expires: 3-1-92

(Ninth Circuit, Excerpt of Record, pp 64, 66, 67)

PLAN OF OPERATIONS
(36 CFR PART 228 SUBPART A)

To: District Ranger
P. O. Box 158
Ukiah, Oregon 97880

1. Claim Owners and Operator

Carl E. Setera and Tony Setera
714 Barclay Hills Drive
Oregon City, Oregon 97045
Telephone: (503) 657-9683

2. Description of Mining Claims and Mineral Interests.

Operations are to be conducted on the Thunderbolt # 2 unpatented mining claim. This claim was validated by Forest Service mineral report dated January 28, 1988.

The operations also include inter-related mining activities on the Thunder-bolt No. # 1 OR MC 32105, Thunderbolt # 4 OR MC 32108, Thunderbolt # 5 ORMC 32109, Thunderbolt # 6 ORMC 32110, and Thunderbolt # 7 ORMC 52207. The Forest Service has not examined these claims for validation. The

claims show the same dredging recovery capabilities as the # 2 claim but higher volume bench gravels for processing.

**** 7. Attachment No. 1 is a report by Geoffrey Garcia Geologist on the mining activities, access and structures for this plan of operations. ****

This plan of operations is submitted by Carl E. Setera, owner and operator.

DATE: 5/11/89 s/ Carl E. Setera

(Ninth Circuit, Excerpt of Record, p. 68)

STARLIGHT RESOURCES

12393 Galice Rd Merlin Oregon 97532
(503) 474-2717

Carl Setera
714 Barclay Hills Drive May 10, 1989
Oregon City, Oregon 97045

Carl Setera:

From my inspection of your property in 1984 it appears that you have good potential for commercially mineable ground. Before you can profit from commercial scale mining of the Thunderbolt Claims however some more work must be done.

#1 The access to your claim must be improved to allow motor vehicles and mining equipment to be moved to the property.

#2 It will be necessary to carry out some sort of testing program possibly trenching with a backhoe to further define your deposit. During this program, careful attention must be paid to keeping good

records as to the location, depth and tenor of gravel, volume run and amount of gold recovered from each trench.

#3 As you are now included in a Wilderness Area it will be necessary for you to establish that the government will not make restrictions that will preclude commercial mining. This would include being able to operate heavy equipment on both sides of the river, disturb and re-contour the ground, and store equipment; and lodge workers at the site.

If the above can be accomplished successfully, we would be willing to consider a lease/option on the Thunderbolt Placer which could be very lucrative for the owners.

Yours truly,

s/ Geoffrey Garcia
Geoffery Garcia

(Ninth Circuit, Excerpt of Record, pp 69-71)

July 18, 1989

Marsha Kearney
District Ranger
North Fork John Day Ranger District
Forest Service
United States Department of Agriculture
P. O. Box 158
Ukiah, OR 97880

Reference: Plan of Operations (2810)
Thunderbolt No. 2 Claim, Carl E. Setera

The following information is furnished in response to your letter dated June 14, 1989:

In view of the time that has passed and other constraints, we are amending our plan of operations to enable approval of low impact activities for 1989, and will provide a separate plan for assessment of more extensive activities in 1990 and future years.

Also, our 1989 on site work will provide data needed to lay out the specifications for the more intensive activities

in 1990 and future years.

We very much need your cooperation and clearance to commence work at the site on July 29. Please call through Roger Dierking at (503) 257-7056 to let us know that we can commence work on that date, and inform us about arrangements to obtain a key to the gate.

1989 PLAN OF OPERATIONS

1. Description of 1988-1989 Assessment Year Operations for the Thunderbolt # 2 Claim. This plan cooperatively responds to your letter of May 19, 1989, in confining mining activity and motorized access to the Thunderbolt #2 claim. However, since assessment work and other authorized work to be accomplished on the other Thunderbolt claims will impact the road and other facilities for the #2 claim, that work is presented as an interrelated impact with the # 2 operating plan. Also, in antici-

pation of Forest Service examination of the other Thunderbolt claims, and due to continuous stream bed changes, we are including as an impact on the plan for the #2 claim, the work to verify discovery locations prior to the validity examination.

1989 Activity.

Step 1. July and August. Restore motorized access for transportation of 1 - 2 workers, equipment, 4 x 4 Chev, 5" dredge, food, tools, etc., for 1989 mining operations and assessment work on Thunderbolt # 2 claim, and dredging production if time allows:

[Restore access involves: An estimated 2 plus weeks work to clear road of fallen trees with chain saw and leave on side of road following route indicated on attached map showing the creek having no name. A Chev 4 x 4 will be used each day in restoring access. Also, the road is being

restored for anticipated 1990 and future use anticipated for providing motorized access for a minimum of two workers, for a minimum of one month each year with a minimum of two round trips each week for mining operations with 5" dredge, a backhoe, materials and supplies for construction and maintenance of tool/bunk building.]

Step 2. Perform assessment work and if time allows commence dredging operations on the Thunderbolt #2 claim with 5" dredge for not more than 4 days at 4 hours per day involving in total stream discharge of 10 yards of stream bed material per day.

Step 3. Obtain location and terrain details for siting facilities and making plan of operations for 1990 and future years.

Step 4. Perform assessment work on other Thunderbolt claims.

1990 and FUTURE YEARS PRELIMINARY PLAN OF OPERATIONS.

To the extent possible, the 1990 Activity plan of operation will be made to allow assessment and environmentally consistent mining activities both for 1990 and for an extended number of years on the Thunderbolt # 2 claim, and for the other Thunderbolt claims when they are validated.

Step 1. Clear road of debris to enable motorized access for mining activities on the Thunderbolt #2 placer claim.

Step 2. Prepare plan of operations for Thunderbolt #2 claim and submit for Forest Service environmental evaluation containing:

Specifications for construction and maintenance of tool/bunk building, and map showing site location details.

Description of the backhoe excavation and processing of bench materials including

reclamation plan.

Description of dredging activities including volume, hours, and other information required to assess impacts and provide mitigating features.

Step 3. Perform assessment work for other Thunderbolt claims and assuming that Forest Service time schedule allows examination of the claims, take bed and bench materials samples to verify discovery points for later confirmation of discovery points by Forest Service mining engineer.

Step 4. Upon obtaining necessary clearances and permits, commence mining operations according to approved plan.

2. Camp and Storage Facilities. As indicated, no effort will be made in 1989 to construct camp facilities. In the absence of such facilities, no equipment and supplies will be remaining on the site upon completion of 1989 operations.

4. Access. Details on use characteristics are provided above. As to road closure concerns, we would anticipate having a key to the gate and other than our use for motorized access for Thunderbolt #2 activities, and possible use for travel by horseback, the road would be closed at all times to motorized public access. As to rehabilitation concerns, based on prior natural rehabilitation capabilities of the area, and the nature of the undeveloped road planned, once abandoned at any future time, the road can be anticipated to rapidly revert to a natural state.

5. Environmental Protection Measures. 1989 activities are planned at such low impact levels that there will be negligible, if any, impacts of environmental or fisher habitat concern. The separate plan for 1990 and future years activities will address these concerns in detail.

Sincerely,

s/ Carl E. Setera
714 Barclay Hills Drive
Oregon City, OR 97045

Enclosure
1. Road location map.

(Ninth Circuit, Excerpt of Record pp 105-110)

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

LEROY CLOSUER AND SHARON CLOUSER (Owners of the Robert E. Mining Claims) CARL E. SETERA, JUDITH M. SETERA, ANTHONY S. SETERA and LOIS A. SETERA (Owners of the Thunder-bolt Mining Claims), GARY HOEFLER, DON WURSTER, CAMERON ANDERSON and ROBIN ANDERSON (Owners of the Wilson Mining Claim).	CIVIL NO 91-3-DA
Plaintiffs, v. EDWARD MADIGAN, Secretary of Agriculture United States of America, DALE ROBERTSON, Chief Forester Forest Service, JOHN BUT-RUILLE, Regional Forester Pacific Northwest Region, JEFF BLACKWOOD, Forest Supervisor, Umatilla National Forest, CRAIG	AFFIDAVIT OF CARL E. SETERA (ONE OF THE OWNERS OF THE THUNDERBOLT CLAIMS)

SMITH DIXON, District Ranger, North Fork John Day Ranger District, MIKE LUNN, Forester Supervisor, Siskiyou National Forest, DENNIS HOLTHUS, District Ranger, Illinois Valley Ranger District, MANUEL LUJAN, Secretary of the Interior, CY JAMISON, Director of Bureau of Land Management, D. DEAN BIBLE, State Director, Oregon State Office,

Defendants.

STATE OF OREGON)
) ss.
County of Multnomah)

I, Carl E. Setera, being duly sworn on oath, depose and say as follows:

1. I have personal, first hand knowledge of the facts as recited herein and am competent to testify as to the matters stated in this affidavit.

2. I am a plaintiff in the above entitled action, a resident of the State of Oregon and one of four owners of property interests granted under the United States

Mining Laws by virtue of location and ownership of the Thunderbolt mining claims lcoated in Section 35, T. 7 S., R. 35 E., W. m., Grant County, Oregon. We have received purchase and other offers for these mining claims.

3. I have had several years experience and interest in mining enterprise, and became an owner of the Thunderbolt mining claims to develop and mine minerals in the claims as a participant in the Nation's self-initiative minerals program.

4. In conducting national forst land mining operations over the years, I have consulted with and coordinated Thunderbolt and other mining operations with the Forest Service to assure compliance with environmental standards.

5. A number of time prior to closure in 1984, I used an existing road as motorized access for a good distance toward

the Thunderbolt mining claims for conducting prospecting, discovery, location, and development operations.

6. The Forest Service did not notify me at any time prior to 1984 that I did not have mining rights to motorized access via the road as a public highway established under Revised Statutes 2477 prior to inclusion of the lands in the national forest, or that the road was a Forest Service road for which a permit would be required.

7. The Forest Service and Bureau of Land Management validated the Thunderbolt # 2 claim in 1988, and they have not yet examined the validity of the other Thunderbolt mining claim.

8. We filed a plan of operations dated May 11, 1989 with the Forest Service to obtain approval for maintenance work to restore the existing road, and to extend

the road to provide motorized access the full distance to the Thunderbolt mining claims and to conduct on-site mining operations which included use of motorized equipment.

9. The proposes operations did not involve bulldozing, removal of any living mature trees, or surface activties which would destroy surface resources and which would not conform to environmental standards.

10. The Forest Service decision on plan of operations denied motorized access; the reason stated in the decision was that motorized access was not needed for the level of mining oeprations which would be accomplished during the same year that road work was to be done; and because motorized access was not the customary means across wilderness land for the level of mining operations to be accomplished during that

year.

11. Our appeal was rejected. We disputed Forst Service authority to stop motorized access over the existing road. We disputed Forest Service authority to deny construction of an extension of the road. We disputed the Forest Service authority to decide that the existing road was not a public highway established prior to inclusion of the lands in the national forests on the basis of information that we submitted to the Forest Service to support our claim of entitlement to a legal determination. We disputed Forest Service authority to materially interfere with our mining claim possessory rights, by denying motorized access and limiting mining operations on our validated Thunderbolt #2 claim, and other Thunderbolt claims in order to preserve the wilderness character and on the basis that motorized transport

was not the customary means within the wilderness area.

12. Based on our consultations with mining experts, Forest Service analyses, and our own knowledge, the use of motorized equipmetn is required for restoration of the road to provide motorized access to our mining claims. We are advised that motorized access itself, is an inseparable part of total mining operations, and such motorized access is required for economic development and profitable operations of the Thunderbolt mining claims. Our geologist's report stating this need was furnished to the Forest Service with our plan of operations.

13. The Forest Service actions have damaged us. There are two operating facets of our placer mining claims along the North Fork-John Day River. Stream dredging operations could have profitably produced mi-

nerals during periods of time when operations meet water quality, fish habitat and stream flow standards. Work could have been done or completed to develop sluicing capabilities of bench materials. The Forest Service materially interfered by preventing motorized access and mechanized on-site oeprations. The Forest Service actions on our plans of operations have caused us hardships, delays and economic losses in time and profits estaimated in excess of $60,000.

I make this affidavit in good faith and in support of the within motion for summary judgment.

Dated: Oct 17, 1991 s/ Carl E. Setera
Carl E. Setera

Subscribed and sworn before me this 17th day of October, 1991, at Portland, Oregon.

Evelyn M. Dierking
Notary Public for Oregon
My commission expires: Oct. 24, 1992

No. 94-1482

In the Supreme Court of the United States

OCTOBER TERM, 1994

LEROY CLOUSER, ET AL., PETITIONERS

v.

DAN GLICKMAN, SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners have a due process right to a formal, oral evidentiary hearing before the Forest Service determines the mode of transportation that petitioners may use to cross federal lands, designated as wilderness areas pursuant to 16 U.S.C. 1131(a), to gain access to their unpatented mining claims.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1482

LEROY CLOUSER, ET AL., PETITIONERS

v.

DAN GLICKMAN, SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A81) is reported at 42 F.3d 1522. The decision of the district court (Pet. App. B1-B25) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 7, 1994. The petition for a writ of certiorari was filed on March 6, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves petitioners' asserted rights to use motor vehicles to gain access to two sets

of mining claims on federal lands that have been designated as wilderness areas under the Wilderness Act of 1964, 16 U.S.C. 1131(a).[1] The Forest Service, an agency within the Department of Agriculture, concluded that petitioners may use only non-motorized means such as pack animals to reach their claims. Petitioners assert that they have a statutorily conferred property right of access to their claims, and that the Forest Service's imposition of the motor vehicle restriction based on evidentiary submissions, briefing, and informal oral conferences—but without a formal, oral evidentiary hearing—violated their procedural due process rights. Pet. i; Pet. App. A3.

The National Forest wilderness areas on which petitioners' claims are situated were in the past open to the public for the location and extraction of minerals, but those lands have since been withdrawn from mineral entry under the Wilderness Act. Only persons who discovered valuable mineral deposits on those lands before they were withdrawn have valid claims to mine there. Pet. App. A4-A5. The Bureau of Land Management in the Department of the Interior administers the laws governing the staking of mining claims on federal lands, and determines the validity of

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[1] The petition identifies a third claim—the Wilson placer mining claim (Pet. 11-15)—that is not in a designated wilderness area, but lies on National Forest land that is part of the National Wild and Scenic Rivers System, 16 U.S.C. 1271. The court of appeals held that the Wilson claimants failed to exhaust their administrative remedies. Pet. App. A36-A45. Petitioners do not challenge that holding, nor do they assert that the exhaustion requirement itself violates due process or is otherwise invalid. See Pet i. There is thus no issue properly before this Court regarding the restrictions on motorized access to the Wilson placer mining claim.

claims such as petitioners'. *Id.* at A6. All of petitioners' mining claims are unpatented, which means that petitioners do not hold fee simple interests, but have only limited possessory interests in the land solely for the purpose of mining, as authorized by federal statute. *Id.* at A5 n.2.

The Wilderness Act requires the Department of Agriculture to grant access to valid mining claims within wilderness areas, and authorizes the Department to regulate such access. 16 U.S.C. 1134(b). Section 1134(b) provides that "where valid mining claims or other valid occupancies are wholly within a designated national forest wilderness area," the Secretary of Agriculture shall, "by reasonable regulations consistent with the preservation of the area as wilderness, permit ingress and egress to such surrounded areas by means which have been or are being customarily enjoyed with respect to other such areas similarly situated." *Ibid.* Pursuant to that provision, the Secretary, acting through the Forest Service, has promulgated regulations authorizing motorized access only "where essential," 36 C.F.R. 228.15(b),[2] and by means "cus-

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[2] Section 228.15(b) provides in relevant part:

> Operations shall be conducted so as to protect National Forest surface resources in accordance with the general purposes of maintaining the National Wilderness Preservation System unimpaired for future use and enjoyment as wilderness and to preserve its wilderness character, consistent with the use of the land for mineral location, exploration, development, drilling, and production and for transmission lines, water lines, telephone lines, and processing operations, including, where essential, the use of mechanized transport, aircraft or motorized equipment.

tomarily used" to access similar claims, 36 C.F.R. 228.15(c).[3]

Under Forest Service regulations, persons proposing to engage in mining operations that "might cause disturbance of surface resources" in National Forest areas must file a "notice of intention to operate." 36 C.F.R. 228.4(a). If the District Ranger determines that the proposed operations "will likely cause significant disturbance of surface resources," the operator must "submit a proposed plan of operations." *Ibid.* The District Ranger may, before approving the proposed plan, identify changes necessary to bring it into conformity with the purpose of the regulations. 36 C.F.R. 228.5(a). "[T]o the extent practicable," Forest Service officers "consult and meet in person, or by phone, with holders of written instruments" (such as mining plans of operation, see 36 C.F.R. 251.82(a)(4)) before deciding whether and to what extent to authorize implementation of such plans. 36 C.F.R. 251.93(a). "The purpose of such meetings is to discuss any issues or concerns related to the authorized use [*e.g.*, mining operations] and to reach a common understanding and agreement where possible prior to issuance of a written decision." *Ibid.*

Any person proposing to conduct mining operations who is aggrieved by a decision regarding a proposed

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[3] Section 228.15(c) provides in relevant part:

> Persons with valid mining claims wholly within National Forest Wilderness shall be permitted access to such surrounded claims by means consistent with the preservation of National Forest Wilderness which have been or are being customarily used with respect to other such claims surrounded by National Forest Wilderness.

plan of operations may take an administrative appeal. 36 C.F.R. 228.14; 36 C.F.R. Pt. 251, Subpt. C. The appellant must submit the grounds for the appeal in writing. See 36 C.F.R. 251.90. Briefs and documentary evidence, including witness declarations or transcripts, may be submitted, see Pet. App. A78, and such documents become part of the administrative record, 36 C.F.R. 251.98. An opportunity for an informal "oral presentation" is also available upon request at the appeal stage. 36 C.F.R. 251.97. The purpose of an oral presentation is to ensure that the parties have an opportunity orally "to present their viewpoints to the Reviewing Officer" and "to restate, emphasize, and/or clarify information related to an appeal." *Ibid.*

2. a. Petitioners Leroy and Sharon Clouser own the first of the two sets of mining claims at issue here, referred to as the Robert E. claims. Pet. App. A7. Those claims are located on land that was included in the Siskiyou Forest Reserve on October 5, 1906, and that was withdrawn from mineral entry when it became part of the Kalmiopsis Wilderness Area on September 3, 1964. *Id.* at A8. In 1985, the Forest Service initiated proceedings before the Department of the Interior to challenge the validity of the claims on the ground that no valuable mineral deposits had been identified before 1964, when the lands were withdrawn. *Id.* at A8-A9. An Administrative Law Judge within the Department of the Interior preliminarily held those claims invalid, *id.* at A9, and petitioners' administrative appeal of that decision is pending before the Interior Board of Land Appeals.

Meanwhile, in 1990, the Clousers filed a plan of mining operations for the Robert E. claims. Pet. App.

A9. The District Ranger approved the Clousers' plan, except that he did not approve the proposal for motorized access to the claims during the period while the Department of the Interior was reviewing the claims' validity. *Id.* at A9, A46. The Clousers appealed the modified plan of operations to the Regional Forester, who affirmed it. *Id.* at A10.

b. Petitioners Carl, Judith, and Anthony Setera own the second set of mining claims at issue here, known as the Thunderbolt claims. Pet. App. A10. Those claims are on land that was included in the Blue Mountain Forest Reserve on March 15, 1906, and that was withdrawn from mineral entry when it became part of the North Fork John Day Wilderness Area on June 26, 1984. *Ibid.* Only one of those claims —Thunderbolt Claim No. 2—is at issue here, and the government has assumed, for purposes of this litigation only, that that claim is valid. *Ibid.*

In 1988, the Seteras filed a notice of intent and plan of operations proposing to use a suction dredge[4] on Thunderbolt Claim No. 2. The plan also proposed to gain access to the claim by clearing and expanding two trails that the Forest Service had closed in 1984, and by driving motorized vehicles over them. Pet. App. A10-A11, A61. The Forest Supervisor approved the plan, but disapproved the proposed motorized access on the ground that such access was not essential given the limited nature of the proposed mining. *Id.* at A11. The Seteras submitted a revised proposed plan of operations in 1989, proposing to use a

---

[4] A suction dredge is like a large vacuum cleaner that draws gravel up from the bed of the river and allows the miners to pass the water and gravel through a crusher and then separate the heavy minerals from the slurry.

five-inch suction dredge and to gain motorized access over the same two trails. *Id.* at A11-A12. The Forest Supervisor again disapproved the use of motorized access, given the limited nature of the proposed operations and the Forest Service's mandate to limit motorized uses in wilderness areas. *Id.* at A12. In this regard, Forest Service personnel had carried a similar suction dredge to the site by pack horse when they examined the claim to assess its validity. *Id.* at A60; see also C.A. Supp. Excerpts of Record (E.R.) 34.

The District Ranger had repeated oral communications with the Seteras and their attorney in an effort to resolve the dispute regarding motorized access. C.A. E.R. 81. The Seteras themselves noted that the District Ranger's office had expressed an interest in "further face to face discussions," but the Seteras felt that no further oral communication was needed because they believed that their plan "as presented in the District Office administrative record for the Thunderbolt No. 2 claim, is simple, self explanatory, and readily understood." *Ibid.* Accordingly, in their notice of administrative appeal, the Seteras did not request an opportunity to make an oral presentation. See *id.* at 75-82. On appeal, the Forest Service affirmed the decisions on both the original and revised plans of operations. Pet. App. A12-A13.

3. Petitioners jointly filed suit against officials of the Department of Agriculture and the Department of the Interior seeking declaratory and injunctive relief to permit them motorized access to their mining claims. Pet. App. A17-A18. The parties filed cross-motions for summary judgment. The district court referred the case to a magistrate judge, who recommended that the court grant summary judgment

in the government's favor. *Id.* at C1-C52. The district court reviewed the parties' objections to the magistrate judge's recommendation and, with minor modifications, adopted it. *Id.* at B1-B25.

4. The court of appeals affirmed. Pet. App. A1-A83. The court of appeals held that the Forest Service had authority under the Wilderness Act to regulate access to petitioners' mining claims, *id.* at A19-A26, and that it had lawfully denied motorized access to the Robert E. and Thunderbolt claims, *id.* at A46-A71. Denial of motorized access to the Robert E. claims was proper, the court held, because the Department of the Interior had preliminarily found those claims invalid, and the Forest Service has an authorized policy of refusing to approve motorized access to mining claims in wilderness lands unless they have been found to be valid. *Id.* at A47-A58. The court also concluded that the proposed motorized access to the Thunderbolt claim would contravene Forest Service regulations. The Forest Service had concluded that motorized access was not essential for the operators on the claims, and that, for the type of operations proposed, motorized access was not "customarily used" within the meaning of 36 C.F.R. 228.15(c). Pet. App. A58-A59.

The court of appeals further held that even if the trails were, as petitioners contended, public rights-of-way that petitioners could use without Forest Service approval pursuant to 36 C.F.R. 228.4(a) (exempting proposed use of public roads from plan-of-operation requirements), petitioners' proposal to clear and broaden the trails required Forest Service approval. Pet. App. A66-A67. The court held that the Forest Service properly denied such approval on the ground that the use of motorized transport was not

"essential" under 36 C.F.R. 228.15(b) because of the relatively small scope of the proposed mining operations and the consequently limited volume of material and equipment that would need to be transported. Pet. App. A59-A60, A64-A65.

The court of appeals rejected petitioners' contention that the Forest Service violated their procedural due process rights by making the challenged determinations about motorized access without first holding formal evidentiary hearings. Pet. App. A75-A80. The court found it unnecessary to decide whether petitioners have statutorily conferred property rights in their claims under 16 U.S.C. 1134(a) (which assures adequate access to privately owned lands surrounded by National Forest lands), because the procedural protections provided by the Forest Service satisfied constitutional due process requirements in any event. Pet. App. A77-A78.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

There is no merit to petitioners' contention (Pet. i, 39-64) that the Due Process Clause requires a formal, oral evidentiary hearing before the Forest Service may regulate petitioners' mode of access to their mining claims over federally protected wilderness lands.[5] Petitioners cite no authority establishing

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[5] Much of the petition (Pet. 15-40) is devoted to other contentions that not only lack merit, but also are (1) waived because they were not made in the cour s below (*e.g.*, Pet. 22 (asserting that respondents failed to develop federal land use management plans)), (2) not encompassed within the ques-

that the Forest Service's procedures are inadequate. It is well established that "[d]ue process is flexible and calls for such procedural protections as the particular situation demands." *Mathews* v. *Eldridge*, 424 U.S. 319, 334 (1976) (quoting *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972)). The nature of the procedures required depends on a balancing of the governmental and private interests involved. Under *Mathews*,

> identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335; see, *e.g.*, *United States* v. *James Daniel Good Real Property*, 114 S. Ct. 492, 501 (1993). Under that analysis, the procedures the Forest Service afforded to petitioners were fully adequate to protect petitioners' interests in access to their mining claims.

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tions presented (*e.g.*, Pet. 21 (appearing to raise equal protection challenge based on difference between Bureau of Land Management procedures and Forest Service procedures)), and/or (3) based on misstatements of the holding of the court of appeals (*e.g.*, Pet. 26 (asserting that court held that petitioners lacked constitutionally protected property rights)). We accordingly do not address those contentions.

First, petitioners' private interest in motorized access to their claims is not weighty. They have yet to establish the validity of the Robert E. claims. Because petitioners have not yet established the validity of those claims, the restrictions on the mode of access to the claims does not deprive petitioners of any valuable benefit. On the Thunderbolt claim, petitioners are free to carry out their proposed mining operations with the use of pack animals or other non-motorized means of transport. The magistrate judge correctly concluded that petitioners "have not challenged [respondents'] position that the modest production from the [Thunderbolt] claim does not justify motorized access." Pet. App. C51.[6]

Second, the procedures that the Forest Service used in this case to modify and approve petitioners' plans of operation did not create any serious risk of erroneous deprivation of petitioners' interests. "The Fifth Amendment does not require a trial-type hearing in every conceivable case of government impairment of private interest." *Cafeteria & Restaurant Workers Union, Local 473* v. *McElroy*, 367 U.S. 886, 894 (1961). Forest Service regulations allow for the submission of evidence and afford informal opportunities to make oral presentations to Forest Service decisionmakers. The parties in this case engaged in an adversary administrative factfinding process, in which the Forest Service accepted all the evidence

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[6] Contrary to petitioners' contention (Pet. 62-63), the difference in the nature of the determination here, where the Forest Service is regulating only the mode of access to mining claims, as compared to a decision by the Department of the Interior concerning the underlying validity of mining claims themselves, justifies the less formal procedures applicable here.

petitioners proffered and made explicit findings in support of its decisions.[7]

Petitioners have failed to identify any evidence that they were unable to submit in the administrative process. They contend (Pet. 47, 59) that the agency erred in rejecting the conclusions in their "critical geologist report" that motorized access was needed (Pet. App. E46-E47), and in not explaining why it did so. Yet, as petitioners themselves acknowledge, the Forest Service did give reasons for concluding that motorized access was not essential, including "that the scope of the proposed operation [at Thunderbolt No. 2] was relatively small, needing only a five inch suction dredge" (see Pet. 48), which the Forest Service had demonstrated could be carried to the site by pack animal. Pet. App. A60. That issue did not turn on credibility, nor was it in any other way inappropriate for disposition on a written record.[8]

Although there was no formal oral hearing, "[t]here is no inexorable requirement that oral testimony

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[7] Pet. App. A79; see C.A. E.R. 62-63, 73-74, 95-98 (decisions on Thunderbolt claim); C.A. Supp. E.R. 58-61 (decision on Robert E. claims).

[8] Petitioners also contend (Pet. 50-52) that the risk of error is illustrated by a need to take lay testimony and make credibility determinations regarding the customary use of the access routes to their mining claims. The court of appeals, however, did not rely on the Forest Service's conclusion that the routes petitioners proposed were not public highways; rather, it assumed that they were public roads that previously had been open to motor vehicles, and instead relied on and sustained the Forest Service's independent rationale that petitioners' plan would involve clearing and upgrading those routes so that petitioners' trucks could drive on them. Pet. App. A62, A66-A67. See 36 C.F.R. 228.12.

must be heard in every administrative proceeding in which it is tendered," *FDIC* v. *Mallen*, 486 U.S. 230, 247-248 (1988), and, in any event, no tendered oral testimony was rejected in this case. Indeed, the Seteras repeatedly communicated orally with Forest Service officials regarding their claims for motorized access, and they concluded before they took their administrative appeal that they were satisfied to present their claims on the written administrative record and that no further oral communication was necessary. Petitioners did not elect to take advantage of the opportunities for oral presentation available to them on their administrative appeals. 36 C.F.R. 251.97. In sum, petitioners have failed to show that the procedures the Forest Service afforded them created a risk of erroneous deprivation of whatever property interest they might have in access to their mining claims.

Finally, the Department of Agriculture's decision not to require the Forest Service to conduct formal evidentiary hearings before regulating motorized access to petitioners' mining claims is consistent with the public interest. "The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances." *Mathews*, 424 U.S. at 348. Rather, all that is required is that the procedures be appropriate to the nature of the decision to be made, and the capacities and circumstances of the claimants. *Id.* at 349 (quoting *Goldberg* v. *Kelly*, 397 U.S. 254, 268-269 (1970)). Judicial-type evidentiary hearings are time-consuming, costly, and often cumbersome. They are not required for, nor are they appropriate to, every governmental decision potentially affecting property interests. Although we believe that no property

rights were infringed by the challenged Forest Service decisions, the procedures by which those decisions were made in this case afforded petitioners more than adequate protection for any property rights that may have been affected.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

LOIS J. SCHIFFER
Assistant Attorney General

ROBERT L. KLARQUIST
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Attorneys

MAY 1995

[9] Petitioners also have an adequate post-deprivation remedy in the form of an action for just compensation in the Court of Federal Claims for any taking of property rights that may have occurred in the wilderness areas.

See 28 U.S.C. 1491(a)(1) (Supp. V 1993); Pet. App. A71-A75.

(3)

No. 94-1482

Supreme Court, U.S.
FILED
JUN 15 1995
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In the Supreme Court
of the United States

October Term, 1994

LEROY CLOUSER, et al.,

Petitioners

v.

DAN GLICKMAN,
SECRETARY OF AGRICULTURE,
UNITED STATES OF AMERICA, et al.,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR THE NINTH CIRCUIT

**SECOND SUPPLEMENTAL BRIEF OF PETITIONERS
IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI**

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June 15, 1995

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7pp

In the Supreme Court
of the United States
OCTOBER TERM, 1994

No. 94-1482

LEROY CLOUSER, ET. AL.,

PETITIONERS,

V.

DAN GLICKMAN, SECRETARY OF AGRICULTURE,
UNITED STATES OF AMERICA, ET. AL.,

RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SECOND SUPPLEMENTAL BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Pursuant to this Court's Rule 15.7, Petitioners respectfully file this Second Supplemental Brief to inform the Court of a Resolution of the Board of Commissioners of Josephine County, Oregon, (Second Supp. Br. App-1). This County Resolution affects a

segment of the R.S. 2477 road right-of-way system claimed to serve the Robert E. mining operations in this case. Petitioners respectfully request that this Court take judicial notice of the County Resolution.

The Josephine County Resolution demonstrates that the Ninth Circuit Court of Appeals decision, enabling the Forest Service to determine establishment of R.S. 2477 rights-of-way and to bar motorized access over existing roads for federal land management purposes, directly conflicts with state public highway programs. The Ninth Circuit decision is also not responsive to important State and local governmental interests to protect the public health, safety and welfare of private land owners, mining claimants and other citizens using R.S. 2477 public rights-of-way to access private lands and unpatented mining claims within national forests.

The County Resolution further demonstrates that the R.S. 2477 Nevada District Court dispute, cited in Petitioners' Supplemental Brief page 7, n. 3, extends beyond Nevada. United States of America v. Nye County, Nevada, U.S. Dist. Ct., Dist. of Nevada, Case No. CV-S-95-00232-LDG (RJJ).

CONCLUSION

Significant State interests in R.S. 2477 rights-of-way provide basis for granting petitioners' petition for a writ of certiorari.

Respectfully submitted,

Philip F. Schuster, II
Counsel of Record
Roger F. Dierking
Counsel for Petitioners

Dated: June 15, 1995

JOSEPHINE COUNTY
BOARD OF COMMISSIONERS

RESOLUTION

Carl Alleman, a resident of Josephine County and other owners of privately owned and unpatented mining claim properties have petitioned this Board for a finding and resolution concerning the establishment of a (sic) R.S. 2477 public highway right-of-way over an (sic) road network identified in the attached map.

Based on Josephine County mining, historical road records, and other information considered by this Board, the Board finds:

1. Extensive historic mining operations occurred in this area during the 1800's involving appurtenant road egress and ingress for commercial and domestic purposes of nature and with sufficient

frequency as to establish an R.S. 2477 public highway pursuant to Oregon laws.

2. The road has been used for motorized traffic for over 60 years.

3. There are ongoing commercial and domestic uses of lands in the area which are presently served by the road and in which the State of Oregon through Josephine County has important state and public interests.

4. The road identified on the map is an R.S. 2477 public highway right-of-way established pursuant to State of Oregon laws in 1883 on unreserved public lands of the United States.

5. Rights to use the R.S. 2477 public highway right-of-way for motorized access by the owners of land and unpatented mining claims served by the road have not been abandoned or terminated under Oregon laws.

6. Motorized use of the road is necessary for the health, safety and welfare of persons involved in the commercial and domestic uses served by the road.

RESOLUTION: Based on the foregoing findings, the Board resolves that said road is an R.S. 2477 right-of-way acquired and protected under federal and Oregon laws and that the owners of the land and unpatented mining claims served by the road have the right of motorized access over the road.

Fred Borngasser
County Commissioner

Irv Whiting
County Commissioner

Harold Haugen
County Commissioner

Date: June 14, 1995

(4)

Supreme Court, U.S.
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No. 94-1482

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OCTOBER TERM, 1994

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In the Supreme Court
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DAN GLICKMAN, SECRETARY OF AGRICULTURE,
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ON PETITION FOR A WRIT OF CERTIORARI
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FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

I. INTRODUCTION

Pursuant to this Court's Rule 15.7, Petitioners respectfully file this supplemental brief to inform the Court of significant proposed R.S. 2477 public highway regulations of the Department of the

Interior. Supp. Br. App-B. These proposed regulations provide substantive and procedural requirements for implementing the Ninth Circuit's R.S. 2477 public highway rights-of-way ruling in this case. Pet. App.-A 65-67.[1] Substantial constitutional and statutory conflicts exist between the Ninth Circuit's ruling and important and pivotal state interests in "[t]housands of miles of highways [which] have been constructed across the public domain." Supp. Br. App.-B 2.[2]

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[1]The Ninth Circuit held that the Forest Service has authority to regulate use of R.S. 2477 public highways. Pet. App-A 67. More importantly, however, the Court of Appeals left standing the District Court's holding that "the Forest Service may properly rule on such issues [as whether or not trails and roads qualify as public highways under R.S. 2477] in the course of carrying out its duty to review and approve plans of operations." Pet. App-A65-66.

[2]The R.S. 2477 statute operates to vest states with in-place jurisdiction over public highway rights-of-way appropriated and granted under the Act. Thereafter,

II. PROPOSED R.S. 2477 REGULATIONS EXTEND THE NINTH CIRCUIT'S RULING, PREEMPTING STATE'S JURISDICTION OVER PUBLIC RIGHTS-OF-WAY

The Ninth Circuit further approved abbreviated Forest Service fact gathering and decisionmaking processes used to determine Petitioners' motorized access rights; these summary procedures were held to be adequate in meeting Fifth Amendment due process standards for protection of petitioners' mining claim property rights. Pet. Ap.-A75-80.

On August 1, 1994, before the Ninth Circuit issued its decision in this case on

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rights-of-way grants are governed by state laws enacted under state police and other powers. Both the Ninth and Tenth Circuits have recognized state jurisdiction to make initial determinations on the establishment of R.S. 2477 rights-of-way. Sierra Club v. Hodel, 848 F2d 1068, 1080, 1083-85 (10th Cir. 1988); Shultz v. Department of Army, U.S., 10 F3d 649, 655 (9th Cir, 1993). Now, however, the Ninth Circuit's holding in this case has completely federalized R.S. 2477 public highway access determinations.

December 7, 1994, the Interior Department published proposed R.S. 2477 public highway regulations. 43 CFR Part 39, 59 Federal Register 39216-39229. Supp. Br. App B. These proposed regulations adopt administrative procedures which contain the identical constitutional and statutory flaws as the Forest Service procedures upheld by the Ninth Circuit's R.S. 2477 ruling in this case. Coincidentally with the filing of this Petition, the period for submission of comments on the proposed regulations has been extended to August 1, 1995. 60 Federal Register 4135 (Jan. 20, 1995).

Key provisions of the proposed R.S. 2477 regulations radically extend the Court of Appeals holding in this case, in effect preempting all state jurisdiction to determine the existence, use and termination of all R.S. 2477 rights-of-ways. See, proposed 43 CFR §§ 39.2 and 39.8. Suppl. Br.

App.-B 7, 11-13.

These proposed regulations provide for abbreviated administrative appeal processes. These processes omit an oral, evidentiary hearing before a neutral trier of fact. For example, proposed 43 CFR § 39.6, Supp. Br. App.-B 10 specifies substantive and procedural requirements for making and determining claims without hearing. Proposed 43 CFR § 39.9, Supp. Br. App.-B 13, 14, fails to mandate a de novo hearing before a neutral factfinder if the claimant excepts to the authorized officer's decision, Marshall v. Jerrico, Inc., 446 US 238, 245, 247-48 (1980).

In addition, proposed 43 CFR § 39.4, Supp. Br. App.-B 9, recognizes and gives effect to federal district court R.S. 2477 determinations without giving similar effect to final state court decisions on R.S. 2477 claims not disputed in the

federal district courts.

Finally, proposed 43 CFR § 39.7, Supp. Br. App.-B 10-11, operates by regulatory authority to forfeit R.S. 2477 claims to public highway rights-of-way unless the claims are timely filed within the time specified by the regulations.

Congress, in a situation analogous to R.S. 2477, has established authority for federal agencies to grant and transfer to states federal highway rights-of-way with procedures for states to return lands to United States jurisdiction when the lands are no longer needed. 23 U.S.C. § 317. Supp. Br. App.-A. Similarly, the R.S. 2477 statute specifies no term for the grants, no provisions for termination of rights-of-way except as provided under state laws, and no provision for the return of the rights-of-way to United States jurisdiction. Pet. App-D 13.

This Court's review of the Court of Appeals R.S. 2477 holding will ensure that the requirement for Congressional action for forfeiture and revestment of in-place public land grants will not be eroded.[3]

Of particular significance under the decisions of this Court are constitutional, statutory and regulatory requirements for (1) prerequisite judicial determinations and Congressional statutory authority for reversion and administration of reverted

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[3]A further illustration of the erosion which has been occurring is the conflict over public land ownership and jurisdiction in the state of Nevada. The government recently filed an action in the Nevada District Court seeking to resolve conflict between county claims over public lands and roads situated upon national forest lands which implicate R.S. 2477 grants. See, United States of America v. Nye County, Nevada, U.S. Dist. Ct., Dist. of Nevada, Case No. CV-S-95-00232-LDG (RJJ), filed March 8, 1995. This Nevada case involves strong reaction to Forest Service actions, and makes review of the Ninth Circuit's R.S. 2477 ruling more meaningful and timely.

rights-of-way involving federal lands, Oregon and California Railroad Company v. United States, 238 US 393, 438-39 (1915); (2) adequate notice and forfeiture provisions and implementing regulations for forfeiture of R.S. 2477 public highway claims such as have been found constitutional by this Court for the registration and forfeiture of unpatented mining claims, Locke v. United States, 471 US 84 (1985); (3) hearings and appeals processes affording states and individuals opportunity to assert and defend their rights and interests under Fifth Amendment due process standards. Pet. 53-59.

Accordingly, the proposed regulations supplanting state court jurisdiction over R.S. 2477 public rights-of-way represent a radical departure from due process standards traditionally employed by the states and this Court. The proposed

regulations also represent a significant diminishment of state control over highways, an event which has been sanctioned by the Court of Appeals' holding.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Philip F. Schuster, II
Counsel of Record
Roger F. Dierking
Counsel for Petitioners.

Dated: June 5, 1995.

Title 23, U.S.C. - Highways Section 317

****

§ 317 Appropriation for highway purposes of lands or interests in lands owned by the United States

****

(b) If within a period of four months after such filing, the Secretary of such Department shall not have certified to the Secretary that the proposed appropriation of such land or material is contrary to the public interest or inconsistent with the purposes for which such land or materials have been reserved, or shall have agreed to the appropriation and transfer under conditions which he deems necessary for the adequate protection and utilization of the reserve, then such land and materials may be appropriated and transferred to the state highway department, or its nominee, for such purposes and subject to the conditions so specified.

(c) If at any time the need for any such lands or materials for such purposes shall no longer exist, notice of the fact shall be given by the state highway department to the Secretary and such lands or materials shall immediately revert to the control of the Secretary of the Department from which they had been appropriated.

(d) The provisions of this section shall apply only to projects constructed on a Federal-aid system or under the provisions of chapter 2 of this title.

Federal Register Vol. 59. No. 146
Pages 39216 to 39229
Monday, August 1, 1994
Department of the Interior
Office of the Secretary
43 CFR Part 39

Revised Statute 2477 Rights-of-Way
****
ACTION: Proposed rule.
****
****
Background
****

Although this more than a century-and-a-quarter-old provision was repealed nearly 18 years ago, interpreting it today remains important, because valid rights-of-way existing at repeal were not terminated. In recent years there has been growing controversy, concentrated in two Western States, over whether specific claimed access route sought to be considered "highways" that were "constructed" pursuant to R.S. 2477, and if so, the extent of rights thus obtained.

****
****

On June 1, 1993, the Secretary of the Interior submitted to the Congress the "United States Department of the Interior Report to Congress on R.S. 2477; The History and Management of R.S. 2477 Rights-of-Way Claims on Federal and Other Lands (Report)". In the "Report" the Secretary informed Congress that the Department of the Interior (DOI) would promulgate regulations to address these ongoing concerns.

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****

Need for the Regulations

Thousands of miles of highways have been constructed across the public domain, including many existing State and county highways in the Western United States, under the authorization of R.S. 2477 and similar provisions. Rights-of-way validly acquired pursuant to R.S. 2477 are historic and important means of access to and across

Federal lands for local citizens, recreationists, and Federal land managers performing official duties.

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****

These proposed regulations are intended to clarify the provision in its historic context and to provide a formal administrative process -- as an alternative to potentially expensive and lengthy judicial proceedings - by which validly acquired rights-of-way will be recognized and regulated.

****

The ability of Federal agencies to meet their statutory obligations is compromised if claims are not identified with finality. For example, land use planning to provide for orderly and responsible decisionmaking on Federal lands is adversely affected if previously unnoticed or unused R.S. 2477 rights-of-way

can be claimed for an indefinite period. Federal land managing agencies are required by existing laws to prepare long-term land use planning documents that identify and analyze the condition of the land, current and future uses, current and future environmental protection measures, and other measures to establish an appropriate management scheme. Preparation of these land use plans, whether they are General Management Plans prepared for each unit of the National Park Service or Resource Management Plans prepared for BLM lands, is a lengthy, complex process designed to meet existing legal requirements, the needs of the public, and the resource.

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Role of State and Federal Law

The relationship between State and Federal law is important both for determining whether a right-of-way was validly

acquired and for determining the scope of a right-of-way. The proposed rule states that Federal law controls interpretation of the offer made by R.S. 2477, but that claimants are required also to comply with State law, which therefore may further condition the acceptance of a right-of-way or define its scope. A claimant cannot, however, accept under State law something that was not offered by Federal law. The interplay between State and Federal law has created some confusion, which this proposed rule is intended to eliminate. The rule would continue to recognize the role of State law, to the extent that State law is consistent with the baseline requirements of Federal law. The Department is authorized to recognize only those interests in the Federal lands that have been established in accordance with the directions of Congress. It cannot

recognize highways purported to be established under state laws that do not meet minimal Federal statutory requirements, written into R.S. 2477, for construction of a highway over unreserved public land.

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While this proposed rule was in preparation, a panel of the Ninth Circuit Court of Appeals issued a decision in the case of Schultz v. Department of the Army, 92-35197, 92-35580, 1993 U.S. App. Lexis, 31037. (9th Cir., Nov. 30, 1993). The panel decision took a somewhat more lenient view of the criteria for establishing a valid R.S. 2477 right-of-way than does this proposed rule. The Federal Government believes the panel decision is not consistent with congressional intent or practice under the statute, and the United

States is seeking a rehearing of the panel's decision before the full Ninth Circuit Court of Appeals. The Department will, of course, take any final decision in the case into account in moving forward with a final rule.

****

Section by Section Analysis

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Section 39.2 Authority

This section would provide citations to the general authorities to the Secretary of the Interior, and to the specific authorities of the National Park Service, Bureau of Land Management, and U.S. Fish and Wildlife Service to manage the Federal lands.

****

Section 39.3 Definitions

This section would define the statutory terms in these regulations.

****

Paragraph (d) Claimant: The term claimant would be defined as any person or entity asserting the existence of and a property interest in a right-of-way pursuant to R.S. 2477 across lands managed by the Department of the Interior under these regulations or in any court action. The Department presumes that all claimants will be State or local government agencies with authority for public highway management. However, there may be rare cases in which a private citizen constructed and operates a highway (that meets all other requirements) in such a manner as to have validly acquired a right-of-way pursuant to R.S. 2477. The Department will consider such claims, unless they are precluded by State law, but will require that these same standards be met.

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Section 39.4 Recognition of a Validly Acquired Grant

This section would provide that the Department will recognize Federal court decisions, and decisions of the authorized officer under these regulations, that a right-of-way was validly acquired.

All parties that already have obtained judicial determinations that they hold a right-of-way pursuant to R.S. 2477 must file a copy of the judicial determination with the authorized officer. This will allow the Department to maintain current, accurate records and to manage the right-of-way appropriately. Any issues that are not resolved in the judicial determination, including the scope of a right-of-way, will be determined by the authorized officer under these regulations.

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Section 39.6 Filing Process for Administrative Determination

Paragraph (c) Information Required in the Claim. A claim would be required to include sufficient information to demonstrate to the authorized officer that each element of R.S. 2477 and each requirement of these regulations has been met, and to determine the scope of a claimed or judicially determined right-of-way. By requiring that standard information be provided for all claims and allowing the authorized officer to determine the sufficiency of each point, the Department believes it is establishing a process that will be fair and consistent as well as flexible enough to allow for differences in record-keeping.

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Section 39.7 Effect of Failure to File a Claim

The rule would require claimants to file

claims within 2 years after the effective date of the final rule. The failure to file a claim by that date would be deemed to constitute a relinquishment of any rights purported to have been acquired under R.S. 2477. Any claims filed after that date would not be accepted or processed. A refusal to process a claim submitted after this date would be final agency action.

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The process in the proposed rule would provide claimants with a reasonable method of obtaining an administrative determination of their claims without undertaking the expense and time of litigation.

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Section 39.8. Processing of the R.S. 2477 Claim

Paragraph (a) Additional Information. This section would set out the procedure that the authorized officer will follow in

processing the claim. The authorized officer will review the information submitted with the claim to determine its sufficiency.

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Failure of a claimant to make reasonable and timely efforts to respond to a request for additional information would be deemed to constitute a relinquishment of any rights purported to have been acquired under R.S. 2477. The Department's decision not to process an incomplete claim will constitute final agency action.

****

Paragraph (f) Review of the Claim. This paragraph directs the authorized officer to review the claim and determine whether the evidence is sufficient to establish that the claimed right-of-way was validity acquired.

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Paragraph (h) Public Notification of Administrative Determination. The authorized officer will publish a notice in a newspaper of general distribution in the vicinity of the claim and in the Federal Register.

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Section 39.9. Appeals Procedure From Administrative Determinations

The proposed regulations allow any interested party, including the claimant, State or local governments, and other public land users to appeal the administrative determination to the Director of the Bureau or Service.

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The decision of the authorized officer will take effect 30 days after its publication in the Federal Register, unless the decision is properly appealed to the

Director during that time.

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The Director may ask the parties or the authorized officer for additional information and may provide for a hearing.

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Supreme Court, U.S.
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No. 94-1482

In the Supreme Court
of the United States

OCTOBER TERM, 1994

LEROY CLOUSER, et al.,
Petitioners,
v.
DAN GLICKMAN,
SECRETARY OF AGRICULTURE,
UNITED STATES OF AMERICA, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS IN REPLY

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I. INTRODUCTION

Pursuant to this Court's Rule 15.6, petitioners respectfully file this Reply Brief addressed to certain arguments of the government first raised in its Brief in Opposition.

The government argues that petitioners are not entitled to formal, oral evidentiary hearings before the Forest Service because petitioners' "private interest in motorized access to their claims is not weighty," that there is no risk of erroneous deprivation because Forest Service procedures constitute "an adversary administrative factfinding process" and, finally, that Forest Service procedures are "consistent with the public interest." Resp. Br. 11, 13.[1]

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[1]The government also argues that there is "no issue properly before this Court regarding the restrictions on motorized access to the Wilson placer mining claim."

II. PETITIONERS' PRIVATE INTEREST IN MOTORIZED ACCESS TO THEIR CLAIMS IMPLICATES A LEGALLY COGNIZABLE PROPERTY INTEREST.

The government characterizes petitioners' private property interests as "not weighty" because (1) the Robert E. claims have yet to be established as valid and (2) petitioners "'have not challenged [respondents'] position that the modest production from the [Thunderbolt] claim does not justify motorized access.'" Resp. Br. 11. The government's assertions are erroneous.

The government introduces the term "weighty" to distinguish whether or not petitioners' property interests are "legally cognizable." The term is devoid

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fn 1 continued:
Resp. Br. 2, n. 1. The Court of Appeals addressed all of petitioners' due process issues as they related to the Wilson Claim. Pet. App.-A 26-32, 75-80. Hence, issues regarding restrictions on motorized access to claims located on lands that have been designated Wilderness Areas and those that have not been so designated are properly before this Court.

of legal significance; it reflects the Forest Service's inability to recognize the nature of the property interests that will be affected by official Forest Service actions. Pet. 41-45.

Petitioners have challenged the Forest Service's position that the "modest" Thunderbolt production did not demand motorized access. Pet. 48-50. Petitioners cited portions of the record which illustrate that full scale mining operations with mechanized equipment were to be undertaken after road rehabilitation had been accomplished in 1989. Pet. 49.

Petitioners' private interest in motorized access to their claims is also substantial because, as the Court of Appeals acknowledged, "Forest Service decisions regarding access may indeed affect whether a claim is found to be 'valid.'". Pet. App.-A 25-26. Under the

Ninth Circuit's decision, the Forest Service, through its summary administrative review procedure, may invalidate otherwise valid claims by terminating motorized access. This ability to invalidate an otherwise valid mining claim implicates a substantial private property interest, especially when due consideration is given to the financial investment which bona fide miners expend in having their claims validated. Pet. 43-44.

III. FOREST SERVICE ADMINISTRATIVE REVIEW PROCEDURES ARE NOT "AN ADVERSARY ADMINISTRATIVE FACTFINDING PROCESS" WHICH COMPORT WITH PROCEDURAL DUE PROCESS.

The abbreviated administrative review process afforded by the Forest Service to determine mining claim access rights is not neutral because the "factfinders" are Forest Service line officers. This flaw, addressed at length by petitioners, Pet. 53-59, is not addressed by the government

in its Brief in Opposition. An administrative review system which employs Forest Service line officers as fact gatherers and decision makers is a system which is very prone to the risk of erroneous deprivation because the decision makers are not neutral. "The purpose of an adversary hearing is to ensure the requisite neutrality that must inform all government decisionmaking." U.S. v. James Daniel Good Real Property, 114 S.Ct 492, 502 (1993).

The lack of neutrality is evidenced by the government's assertion that "petitioners did not elect to take advantage of the opportunities for oral presentation available to them in their administrative appeals." Resp. Br. 7, 13. The record reveals that oral presentation to the Forest Service was waived by the Thunderbolt petitioners precisely because "their contacts with the [Forest Service] office,

[demonstrated] ... that the posture of that office weighs against recognition of [petitioners'] mining claim rights to motorized access ... [and demonstrated] [t]he appearance of partiality and an adverse posture against [petitioners'] discovery rights" by the Forest Service. C.A.E.R. 82, 94. (bracketed matter added).[2]

Forest Service prosecutorial bias and lack of neutrality was described by Mr. Bronson C. LaMoure, a retired Director, Minerals and Geology for the Forest Service:

> "In my evaluations of actions of Forest Service offices on plans of operations, I found that the practices of the various offices were not always uniform and that some Forest Service officials

[2]The comments of Paul Vetterick, Acting State Director for Oregon and Washington, BLM, also address the propriety of Forest Service actions "when civil servants pick and choose the laws they enforce, or execute laws on whim or the turn of public opinion." C.A.E.R. 89.

> considered and acted on plans of mining operations based on perceptions of minerals programs, resource production and interrelated public interests which were contrary to the policies for approval of mining operations consistent with the program for economic prospecting, development and removal of national forest minerals under the environmental and reclamation standards. The most common perception underlying inconsistent practices was the idea that a prosecution approach was to be taken in considering plans of operations...." Pet. App. E37. (emphasis added).

All of the above evidence of Forest Service bias is uncontradicted in the record and unanswered by the government. The government fails to explain how these Forest Service procedures do not "creat[e] an impermissible risk of bias in the enforcement and administration" of mining claim access issues. Marshall v. Jerrico, Inc., 446 US 238 (1980). A "realistic possibility" exists that Forest Service officials' "judgment will be distorted by

the prospect of institutional gain as a result of zealous enforcement efforts." Supra, 446 US at 250.[3]

IV. THE FOREST SERVICE'S ABBREVIATED REVIEW PROCEDURES ARE NOT "CONSISTENT WITH THE PUBLIC INTEREST."

The government excuses the due process flaws with the Forest Service's administrative review procedures by asserting that "[j]udicial-type evidentiary hearings are time-consuming, costly, and often cumbersome." Resp. Br. 13. However, such is not the case if access issues are decided before a neutral administrative law judge within the Department of the Interior. Pet. 61-63, App.-D 29-36.

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[3]Costs of agency administration of public roadways in wilderness areas, to protect surface use and the environment, are considerably reduced when roads are closed through utilization of an abbreviated, inexpensive and "efficient" administration system. See, Supp. Info., Proposed R.S. 2477 Regs. at Pet. Supp. Br. App-B 3-4, 11.

The government's cost argument is also belied by the fact that state courts, having jurisdiction to decide the issue of establishment of R.S. 2477 rights of way, already furnish the full panoply of due process hearing protections.

The government argues that a post-deprivation remedy is available in the Court of Federal Claims "for any taking of property rights that may have occurred in the wilderness areas." Resp. Br. 14, n.9. This Court has recently viewed this argument with skepticism on the basis of "congested civil dockets in federal courts...." U.S. v. James Daniel Good Real Property, supra, 114 S.Ct at 502. In any event, the invalidation of an otherwise valid mining claim through termination of motorized access would simply negate any adequate post deprivation remedy in the Court of Federal Claims.

Finally, an R.S. 2477 public highway may be a vested, existing right which the Forest Service has no authority to regulate in any event. Pet. 36-37. Accordingly, a post-deprivation action in the Court of Federal Claims "'would not cure the temporary deprivation that an earlier hearing might have prevented.'" U.S. v. James Daniel Good Real Property, supra, 114 S.Ct at 502.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: June 5, 1995.